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In the Supreme Court of the United States of America

OCTOBER TERM, 1979

Case No: 79-457

GLORIA O. PATTERSON AND EDDIE R. CALLAHAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING WRIT 4

CONCLUSION 29

ADOPTION OF PETITIONS OF CO-PETITIONERS 29

CERTIFICATE OF SERVICE 30

APPENDIX A-1

Opinion of Court of Appeals for Fifth Circuit A-1

Order Denying Petition for Rehearing A-35

Indictment A-36

TABLE OF CITATIONS

Cases: Page

Blumenthal vs. United States,
332 U.S. 539, 68 S. Ct. 248, 92 L. Ed. 154 (1947) 6

Berger vs. United States,
295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) 26

Kotteakos vs. United States,
328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) ... 4, 26

United States vs. Bertolotti,
529 F. 2d 149 (2nd Cir. 1975) 4, 6

United States vs. Cuesta,
597 F. 2d 903 (5th Cir. 1979) 3

United States vs. Levine,
546 F. 2d 658 (5th Cir. 1977) 5, 25

United States vs. Miley,
513 F. 2d 1191 (2d Cir. 1975) 6

CONSTITUTION:
Constitution of the United States,
Amendment V 2

STATUTORY PROVISIONS:
18 U.S.C. Section 371 2
18 U.S.C. Section 846 2
28 U.S.C. Section 1254(1) 1

UNITED STATES SUPREME COURT RULES:
Rule 19(1)(b) 1

FEDERAL RULES OF CRIMINAL PROCEDURE:
Rule 8(b) 3
Rule 12(b) 3
Rule 14 3

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Petitioners, Gloria O. Patterson and Eddie R. Callahan, pray that a Writ of Certiorari will issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, whereby that Court affirmed the conviction of the Petitioners after a Jury Trial.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 597 F. 2d 903 (1979). A copy of that Court's Opinion appears in the Appendix hereto (Page A-1). A timely Petition for Rehearing was filed but was subsequently denied by the Court (Page A-35).

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on June 25, 1979. A timely Petition for Rehearing was filed. The Court of Appeals entered its Order denying the Petition for Rehearing on August 13, 1979. This Petition for Writ of Certiorari is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Supreme Court Rule 19(1)(b).

QUESTION PRESENTED

The question presented by this case is as follows:

WHETHER THE PETITIONERS' RIGHT TO A FAIR TRIAL AS GUARANTEED TO THEM BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS SUBSTANTIALLY PREJUDICED BY THE TRIAL COURT'S REFUSAL TO GRANT MOTIONS FOR DISMISSAL, SEVERANCE AND ACQUITTAL SINCE THE GOVERNMENT'S PROOF MATERIALLY VARIED FROM THE INDICTMENT IN THAT THE PROOF AT TRIAL SHOWED MULTIPLE CONSPIRACIES EVEN THOUGH THE INDICTMENT CHARGED A SINGLE CONSPIRACY.

CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT FIVE (5):

"No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

In February of 1977 a Federal Grand Jury in Tampa, Florida returned a ten (10) count indictment which charged various Federal offenses against various individuals. The Petitioners were charged in Count I of this Indictment with the offense of Conspiracy to Import Cocaine and Marijuana in violation of 18 U.S.C. Sections 371 and 846 (Page A-36). Pursuant to an Order of the Trial Court the trial of Count I was severed from and preceded the Trial of Counts II through X. The Petitioners were subsequently convicted by a Trial Jury and the Trial Court thereafter sentenced them to serve a terms of imprisonment followed by special parole terms.

The United States Court of Appeals for the Fifth Circuit affirmed the Petitioners' conviction in the case of *United States of America vs. Cuesta, et al.*, 597 F. 2d 903 (1979) and also denied their Petition for Rehearing.

As noted above, the Petitioners were charged in Count I of the Indictment with conspiring with several co-defendants in a single conspiracy to violate the Federal laws concerning controlled substances.

The Indictment follows a format familiar in narcotics conspiracy cases where the roles played by the conspirators, allegedly acting as suppliers, middlemen and distributors, are set out in the Indictment. Further, the Indictment alleges unindicted co-conspirators. Prior to the commencement of Trial, the Government identified fifteen persons who were allegedly unindicted co-conspirators.

Prior to Trial, the Petitioners moved to dismiss the Indictment on the grounds that there existed a fatal variance between the conspiracy charged in Count One of the Indictment and the proof at Trial to the prejudice of the Petitioners. This Motion to Dismiss was denied.

Further, prior to the Trial, the Petitioners moved to severe their individual cases for Trial proceedings from the cases of Co-defendants pursuant to *Rule* 14, 8(b) and 12(b). As part of that Motion, the Petitioners argued that although the Indictment charged one conspiracy involving Marijuana and Cocaine, the proof at Trial would show multiple and distinct conspiracies and that the Petitioners would be severely prejudiced by such improper joinder. This Motion was also denied.

The Government's case at Trial was based upon two principal areas of evidence. First, the Government utilized the testimony of a paid Government informant, Carl Swartz, who played an active and ongoing role in one of the conspiracies proven. Second, the Government introduced into evidence and played for the Trial Jury tape recordings, accompanied by transcripts of these recordings, of conversations intercepted as a result of

Court ordered interceptions of oral communications. Government Exhibit 2A was the trial tape and Government Exhibit 4 was the transcript of the trial tape. These interceptions occurred as a result of two concealed microphones in the bail bond's office of the Petitioner Callahan, and a later telephone interception at the home of co-defendant, Anthony G. Lopez.

Throughout the Trial the Petitioners unsuccessfully continued to request a severance based upon the grounds of variance from Indictment to proof. Additionally, at the close of the Government's case, the Petitioners moved for a Judgment of Acquittal, again on the grounds that the Government's proof materially varied from the Indictment. At this time, since all the Government's proof had been introduced, the Petitioners analyzed for the Trial Court the transcripts of the tape recordings heard by the Jury to demonstrate that various separate and distinct conspiracies had been shown by the Government to the Jury. The roles played by the Co-defendants and other in these conspiracies varied significantly from the roles which the Co-defendants were alleged to have played in the Indictment. A similar motion was made at the close of all of the evidence in the case. Both motions were denied.

On Appeal to the United States Court of Appeals for the Fifth Circuit the Petitioners continued to argue that there was a material variance between the allegations of the Indictment and the actual proof at trial. The Fifth Circuit rejected this position, found only one conspiracy, and thereby affirmed the Petitioners' conviction.

REASONS FOR GRANTING WRIT

The qualification for review on Certiorari, as specified in Rule 19 of this Court, is abundantly and compellingly fulfilled by the case at bar in that the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals, *United States vs. Bertolotti*, 529 F. 2d 149 (2nd Cir. 1975), with a decision of this Honorable Court, *Kot-*

teakos vs. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), and with one of its own decisions, *United States vs. Levine*, 546 F. 2d 658 (1977). Additionally, the Fifth Circuit Court of Appeals through its decision has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned a departure by a lower Court, as to call for an exercise of this Honorable Court's power of supervision. In that regard the Petitioners would show that the case at bar presents an excellent opportunity for this Honorable Court to redefine the principles of law governing material variances between the allegations of an Indictment and the actual proof at Trial in conspiracy type cases involving narcotics' prosecutions given the increasing number of such prosecutions wherein wire-tap evidence is utilized to an extensive, if not exclusive, degree. Further, the primary evidence against the Petitioners, the tapes and transcripts, are susceptible to exacting analysis, demonstrating clearly and concisely the existence of separate and distinct conspiracies which constitute the material variance.

The main thrusts of Petitioners' Appeal to the Fifth Circuit Court of Appeals was that their right to a fair trial was substantially prejudiced by the Trial Court's refusal to grant the Motions for Severance, Dismissal and Acquittal since the Government's proof at trial materially varied from the allegations of the Indictment in that the proof showed multiple conspiracies even though the Indictment alleged but one conspiracy. It is the Petitioners' contention herein that the Fifth Circuit Court of Appeals glossed over this issue and in doing so conflicted not only with a prior pronouncement of this Court and another Court of Appeals but also with its own previous pronouncements vis-a-vis this issue.

Often, when a request is made for a reversal of a conviction based upon a fatal variance between the Indictment and the proof, it is extremely difficult to marshall the evidence in order to clearly show the existence of multiple conspiracies. This difficulty is usually magnified by the presence of many Government witnesses, subjected to the lengthy and often contradictory cross-examinations.

Fortunately, for the Petitioners herein, the factual situation in the instant case is somewhat unique and lends itself to a concise analysis, clearly illustrating the existence of at least five separate, unrelated conspiracies. Because the Government's proof as to the Petitioners consisted in great part of tape recorded conversations, it is possible to review the transcripts of the conversations and to marshall the facts so as to clearly demonstrate the multiple conspiracies shown by the Government's proof. Further, by carefully and closely analyzing the transcripts, it is possible to demonstrate that the multiple conspiracies were in no way related to the single conspiracy charged in the Indictment.

In order to place the following factual analysis in proper, legal perspective it is important to note the leading and oft cited case of *United States vs. Bertolotti*, 529 F. 2d 149 (2nd Cir. 1975), one of the cases which the Petitioner contends conflicts with the Fifth Circuit opinion herein. In *Bertolotti* the Second Circuit discussed (1) how a defendant is prejudiced from a variance between an Indictment charging a single overall conspiracy and proof showing a number of smaller ones and (2) the factors to be considered in analysising an Indictment and the proof at trial to determine if a defendant's claim of fatal variance is valid and requires reversal.

Bertolotti points out the prejudice caused by a variance can take many forms. *Bertolotti* is concerned with what Judge Friendly described in *United States vs. Miley*, 513 F. 2d 1191, (2nd Cir. 1975) as a "spillover effect" or the transference of guilt from hearsay emanating from a member of one of the conspiracies used to the detriment of a member of another.

While recognizing that the question of prejudice is not solely quantitative, *Bertolotti* notes that a consideration of "the numbers" involved in the case is an appropriate starting point for analysis. See *Blumenthal vs. United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L. Ed. 154 (1947) and *United States vs. Miley*, *supra*, at page 1209. Further, it is generally conceded that the possibility of prejudice resulting from a variance increases with

the number of Defendants tried and the number of conspiracies proven. Consideration must be given not only to the indicted Defendants, but also to any additional unindicted co-conspirators. The length and complexity of the Trial must also be given consideration in determining if a Defendant was prejudiced.

In view of these legal guidelines, the obvious starting point is the Indictment. The Indictment here sets out three primary categories of Defendants. The Indictment alleges that Lopez, Callahan, and Patterson would obtain Marijuana and Cocaine from the Defendants, John T. Bowles and Bryant Bowles, and would distribute this Marijuana and Cocaine to Cuesta, Matassini and Lauro. Thus, the Bowles brothers are alleged to have been the suppliers, Lopez, Callahan and Patterson are alleged to have been the middlemen, and Cuesta, Matassini and Lauro were to have been the distributors, customers or outlets according to the single conspiracy theory alleged in the Indictment.

The format used in the instant Indictment is strikingly similar to the Indictment used in *Bertolotti*, which also sets out suppliers, major middlemen and customers. In *Bertolotti*, the Second Circuit concluded the "single conspiracy" was a product of the Government's imagination.

In undertaking the analysis suggested in *Bertolotti*, it is significant to note there were eight persons charged in the Indictment and fifteen persons named as unindicted co-conspirators, or a total of twenty-three alleged co-conspirators.

The next step is to determine the number of separate conspiracies actually shown by the proof. To do this, the Petitioners will review the transcripts of the tape recorded conversations which were the crux of the Government's case against them. Such a review reveals by conservative analysis at least five separate and distinct large conspiracies and various other smaller, less clearly defined conspiracies.

CONSPIRACY NUMBER ONE

A review of the recorded conversations shows that the Government's proof at Trial reveals a conspiracy, referred to as Conspiracy Number One, which operated separate and apart from the conspiracy alleged in the Indictment. Conspiracy Number One involved as participants the Defendants Cuesta, Matassini and Lopez, unindicted Co-conspirator Darrell Lopez and persons identified only as "the other guy" and Andy. Cuesta and Matassini were to supply Lopez, the middleman, to distribute the controlled substances to customers or outlets identified as Darrell Lopez, "the other guy", and Andy.

The conversations introduced into evidence which reveal the existence of Conspiracy Number One are:

1. Tuesday, April 6, 1976, at Callahan Bail Bonds Inner Office between Lopez, Cuesta and Matassini at 2:23 P.M.

2. Tuesday, April 6, 1976, at Callahan Bail Bonds Inner Office between Lopez, Cuesta and Matassini at 2:40 P.M.

3. Thursday, May 6, 1976, at Callahan Bail Bonds Outer Office between Patterson and Lopez, at 1:47 P.M.

4. Friday, May 7, 1976, at Callahan Bail Bonds Inner Office between Lopez and Cuesta at 2:39 P.M.

5. Friday, May 14, 1976, at Callahan Bail Bonds Inner Office between Lopez and Cuesta at 1:51 P.M.

6. Friday, May 14, 1976, at Callahan Bail Bonds Inner Office between Lopez and Cuesta at 2:03 P.M.

The initial conversation played for the Jury involving Defendants Lopez, Cuesta and Matassini at the Inner Office on April 6, 1976, at 2:23 P.M., shows from the outset the variance complained of. This short conversation also shows clearly that

in Conspiracy Number One, Matassini and Cuesta are not distributors, as is alleged in the Indictment, but are, in fact, suppliers to Lopez. The following portion of that conversation shows Cuesta and Matassini as suppliers:

> LOPEZ: *And (inaudible) what, what, what, do you all get it at?*
>
> MATASSINI: What could I get it for? — Oh I don't know.
>
> CUESTA: *I tell you we're not really getting very fantastic deals.*
>
> LOPEZ: Oh you weren't getting good deals.
>
> CUESTA: You know we were just workin' with good people. (inaudible) (all talking at once.)
>
> LOPEZ: Do you wanna outlet? — *I, I get you an outlet* but its got to be, got to be the right price. I mean we talkin' about say, ah, five hundred thousand, you know at a time they'll buy. Two hundred thousand, you know, but it's got to, see because these people get it at a certain price themselves and *how the hell they gonna buy it from us, from you, you know,* if they could get it cheaper, you see. You have to be careful. Boy, scares me (inaudible) Jesus Christ. (Emphasis supplied).

Significantly, Lopez, seeking to determine the price that Matassini and Cuesta pay for the controlled substances, inquires whether Matassini and Cuesta *need an outlet*, explaining the price must be right. Certainly this conversation is not consistent with Matassini and Cuesta being distributors as the Indictment alleges.

The next conversation involves the same three participants at a later time, 2:40 P.M., on May 6, 1976, at the same location. The following statements indicate a conspiracy separate and apart from the one charged in the Indictment, and that the roles played are different from their roles as alleged in the conspiracy charged in the Indictment. For example, Matassini explains to Lopez, in the early portions of this recording, that Matassini has a connection who is willing to furnish 10,000 pounds of Red Columbian to Lopez, and that the supplier wants a connection.

Cuesta then explains the connection, wants him to ask Lopez if all parties could get together. Matassini explains he and Cuesta are trying to work themselves in with the connection so that they *can avoid* being middlemen.

Later, the three participants discuss the split of any profits as follows:

> LOPEZ: Anything over two and a quarter, *we'll split in half, three ways or whatever you want.*
>
> CUESTA: No it'll be three ways.
>
> LOPEZ: Three ways yeah that's what I mean three ways I'll go three ways with you, two and a quarter (inaudible). Now if you want some (inaudible) I can't buy from him in other words I can't get (inaudible). (Low talk, inaudible) I have a cousin in Miami, a young kid with a van, they never bother him, *a smack van.* A young kid (inaudible). He has a house full of it (inaudible) (all talking low) (inaudible).
>
> MATASSINI: (Inaudible) —in good faith— *we can't move it* (inaudible). (Emphasis added).
>
> LOPEZ: . . .The people (inaudible) if they came down on their fucking price man — In other words like, I'm tellin' you my price man—
>
> CUESTA: Maybe they will come down on their price if we can assure them that once — (inaudible)
>
> LOPEZ: I'll-I'll come up with five hundred thousand dollars tomorrow.
>
> LOPEZ: *I have the outlet* for the people to buy.
>
> CUESTA: Yeah.
>
> LOPEZ: *I have the outlet, in other words, but I don't have the footwork and the people (inaudible) I had my cousin Darrell* (inaudible) do you want to get into me (inaudible) do you want to get into me, do you want to talk to your man to see if he wants to buy from me or now (inaudible) in other words I have to talk to my people (inaudible) (noise interference). (Emphasis added.)

Here the participants in Conspiracy Number One discuss

splitting the profit three ways, and the necessity of finding outlets, which Lopez says he can provide through his cousin in Miami who drives a *smack van,* and his cousin Darrell. Matassini, alleged to be an outlet or distributor, says plainly in good faith he *cannot* move the controlled substance. Finally, Lopez discusses his cousin Darrell Lopez, as the outlet for this separate conspiracy.

Importantly, the participants discuss horse and smack, two commonly used "street" terms for Heroin, a controlled substance not charged in the Indictment. This discussion of hard drugs, not charged, created obvious improper prejudice to the Petitioners.

In another conversation involving Lopez in the Outer Office on Thursday, May 6, 1976, at 1:47 P.M., he explains Conspiracy Number One and that Cuesta and Matassini have come to him for advice, stating:

> LOPEZ: Not him by himself, I don't believe in that. Shit (pause) they got somethin' goin' real fuckin' good but like anything else they don't have no, *they don't know what to do with it, you know.*
>
> PATTERSON: *They don't have no outlets for it.*
>
> LOPEZ: They don't they don't they don't know how to handle it. (Emphasis added).

Here again, Lopez is expressing in a narrative form to Mrs. Patterson, an employee at the Bail Bond Office, that in Conspiracy Number One, Cuesta and Matassini are acting *as suppliers,* not distributors as alleged.

Conspiracy Number One is further revealed in a conversation in Callahan's Inner Office on Friday, May 7, 1976, at 2:39 P.M. between Lopez and Cuesta. Further indicating a separate conspiracy, with a supplier other than those named in the Indictment and in which Cuesta is not an outlet or distributor, the following conversation was played for the Jury:

LOPEZ: Did they explain to 'em that *we got a big outlet*, but the idea we gotta get it as the right price. Then they gotta give us a couple of days to, you know meet people, you know like (inaudible) you know (inaudible) go up there, call there. (Emphasis added).

CUESTA: (inaudible) tell him (inaudible) we're going and then he says you know, figure it out so many at that price (inaudible).

LOPEZ: Yeah. (Emphasis added).

On Friday, May 14, 1976, in the Inner Office at 1:51 P.M., Cuesta and Lopez continue to discuss the separate conspiracy in which they are involved. After Cuesta assures Lopez that the deal will go through, the following exchange occurs:

LOPEZ: We could get somebody to get a place for us on the beach, so we can work there on the beach and see what we have and all that. You know. The *only ones that's gonna be involved is gonna be LEO, you and me.* (Emphasis added).

CUESTA: Yeah.

LOPEZ: (Inaudible) So we need a guy to get a place on the beach. I got, I got, we'll get VITO's mother owns apartments, houses on the beach, you know what I mean?

CUESTA: Yeah.

CUESTA: No we called the guy's wife see, (inaudible) and she said, you know, ah, they, they're out there now be back, ah, within a week, you know. But that they might not, she might know everythin' you know, they might be comin' back any day now.

LOPEZ: Yeah, they never tell everything.

CUESTA: You know, (inaudible) they wouldn't be comin' back because (inaudible). So they could be back tomorrow or tonight or the next day, ah.

LOPEZ: Well we gotta, we gotta get it, man, I can't hold 'em, I gotta hold 'em off. You know just, ah, when we get it then we work it from there. See. Just say we'll work it from there, when we get it. But I know for, ah, definite for sure, see *my cousin's comin' down and he'll pick up two or three,*

you understand, right off the bat. See, ah then *I got the other guy* up there that he, *he'll pick it all up*, but I'd work with my cousin. *That other guy* got heat on him. (Emphasis added).

Earlier in this conversation Cuesta discusses five kilos that are promised to them on a deal, as well as five kilos that Matassini can provide. These suppliers are separate and apart from the Bowles Brothers and not related to the conspiracy charged.

In the final conversation showing Conspiracy Number One, on Friday, May 14, 1976, at approximately 2:03 P.M., at Callahan's Inner Office, Lopez and Cuesta discuss the following:

LOPEZ: But be careful, you know, do everything right, take your time. *Get what's comin' to ya'll and stash it somewhere.* And tell LEO not to make no calls to nobody himself.

CUESTA: No, no (inaudible).

LOPEZ: We handle it, you understand. *Between me and you and him whatever we want, we do it. Like once the word gets around here that he has they gonna get on him.*

CUESTA: Oh Yeah.

LOPEZ: (Inaudible) *We'll do it out way, we'll call my cousin Andy and he'll fly down.* We do it like that, you know. (Emphasis added).

Clearly this conspiracy is between Lopez, Cuesta and Matassini, and Lopez's cousin Andy will act as an outlet.

As mentioned, these recordings were played for the Jury in their entirety. As indicated, these recordings reveal the existence of a conspiracy, not involving the Petitioners, ongoing at the same time as the conspiracy charged in the Indictment. There is no evidence that the Petitioners played any part in this conspiracy. To the contrary, Conspiracy Number One had its own middlemen not connected with the Petitioners.

The Petitioners are prejudiced by the introduction into evidence of the recordings because the Jury would transfer guilt from the members of this conspiracy to them, and because of the introduction of hearsay evidence into their Trial. The Petitioners should have been granted a separate trial so that the Jury would not have been prejudiced by discussions of "horse", smack vans and criminal activity not related to the Appellant.

CONSPIRACY NUMBER TWO

A review of the recorded conversations shows that the Government's proof at Trial reveals a conspiracy, referred to as Conspiracy Number Two, which operated separate and apart from the conspiracy alleged in the Indictment. Conspiracy Number Two had as participants the Defendants Lopez and Callahan, unindicted co-conspirators Darrell Lopez, Harry Hoffman and a person identified as Russ, as well as a person identified as Andy, but stipulated not to be Andy Cuesta, a Co-Defendant. In Conspiracy Number Two, Harry Hoffman, also known as "The Rock", Andy and Russ acted as suppliers for Lopez and Callahan, who were to distribute the controlled substance to Darrell Lopez.

The conversations introduced into evidence revealing the existence of Conspiracy Number Two are:

1. Thursday, April 22, 1976, at Callahan Bail Bonds Outer Office between Lopez and Callahan, at 4:26 P.M.

2. Thursday, April 22, 1976, at Callahan Bail Bonds Outer Office between Lopez and Callahan, at 4:51 P.M.

3. Thursday, April 22, 1976, at Callahan Bail Bonds Outer Office between Lopez and Callahan, at 4:54 P.M.

As can be seen, three of the conversations showing Conspiracy Number Two occurred on the same day, during a short period of time between Lopez and Callahan.

Although the conversation between Lopez and Callahan on Thursday, April 22, 1976, in the Outer Office beginning at 4:26 P.M. is somewhat lengthy, it is extremely important to reprint pertinent segments to clearly establish that the suppliers in Conspiracy Number One were Andy, "The Rock", and Russ. At the outset, Lopez explains in great detail to Callahan that he is having difficulty with Andy in making a purchase, that something always seems to happen to delay matters, and that Andy hikes the price and refuses to apply a sample. In response, Callahan states as follows:

> CALLAHAN: I think the best thing that you forget ANDY, *deal directly.*
>
> LOPEZ: Yeah
>
> CALLAHAN: With The Rock, 'cause The Rock sells.
>
> LOPEZ: He tol' me this EDDIE, that's why I gotta talk to him. He tol' me PICO. I said you know I got the connections, yeah PICO I know that. I said but the only thing is, says PICO look, I (inaudible) for you. Its all over St. Pete and you think (inaudible) St. Pete, why can't you give me what the fuck I, *why can't you give me what I want?* Quit playing games with me like that, hack the price up on me, and then how can I tell, if I tell you, bring me a hundred thousand dollars and than I tell you, go three hours from here and pick it up an' all you want to do is this, I tell him, (coughing to see if its the same type. *If its the same kind I'm buying, why should I travel three hours to go down and pick it up when we can get it in for the same price or cheaper.* If its a little bit better then we go for it. I mean this is ridiculous now, the last minute he call me an' then tells me its, its commercial, an' the only thats going good is Red, Columbia Red and Gold. Commercial is a low kind of Columbia, but don't (inaudible) my fuckin' foot was fallin' apart.
>
> CALLAHAN: The only thing is from now on say look, ANDY let's forget about it. I wanna see The Rock, I wanna.
>
> LOPEZ: It ain't that easy. Uh I,
>
> CALLAHAN: You want me to get ahold of 'em?
>
> LOPEZ: You see, you, that's why I like to talk to you

alone, because it ain't that fuckin' easy. I mean ANDY, first they told me so much, then ANDY raised the price up on me. He tell me —

CALLAHAN: *Then ANDY'S tryin' to make a buck on the side?*

LOPEZ: I don't know, *he tells me PICO you know I don't make the prices*, they (inaudible) I said (inaudible) whoever raised it up, I still can make money.

CALLAHAN: See the only thing is I don't wanna, you know.

LOPEZ: All you gotta say, all you gotta say is don't say that I like to see him alone somewhere or you, or you say that uh uh anything uh how you doing', anything, I don't know how the hell to get.

CALLAHAN: *I'll tell you who I try to get a hold of RUSS.* Now RUSS is the right hand man.

LOPEZ: Yeah but (inaudible) The Rock, he's the one, he talked to me Friday.

CALLAHAN: Rock did?

LOPEZ: Yeah. (Emphasis added).

This lengthy segment clearly indicates the difficulty that Lopez is having with his suppliers, "The Rock" and Andy.

Later, Lopez explains that he has asked Andy for a sample of one pound out of the 900 pounds which Andy has so that Lopez can take it to his man in Miami to look at. Thus, in Conspiracy Number Two Lopez is distributing the Marijuana to persons in Miami and not to the Cuesta, Matassini and Lauro as is alleged in the Indictment.

Still later, after Callahan explains to Lopez how to handle Andy, Lopez states Andy is like the middleman, but that he wants to talk to "The Rock" because if he can get "The Rock" he can explain the problems that he is having with Andy.

Again, on Thursday, April 22, 1976, in the Outer Office at 4:51 P.M., the following occurs:

LOPEZ: *Hey listen, if I don't hear from these guys by Monday from ANDY, I ain't gonna call ANDY no more.*

CALLAHAN: No.

LOPEZ: An' if I don't hear from these guys on Monday from ANDY, I ain't gonna call him at all. I don't hear from 'em do you think that we could get ahold of The Rock? *Yeah, but we gotta go through Andy.*

CALLAHAN: *No, I can get ahold of The Rock, don't worry about it. I can get ahold of The Rock.*

LOPEZ: 'Cause I don't wanna, I don't wanna get no trouble between them you understand, huh? (long pause, background noise) Well he called you last time he was, he was in Miami, I don't know whether he'll call you back now.

CALLAHAN: That's why I flew up there to meet him. (Emphasis added).

This conversation again points out the existence of "The Rock" as a supplier through his middleman Andy and shows the difficulties which Callahan and Lopez are having in making a connection with The Rock as a supplier.

The serious prejudice caused to Petitioners as a result of the use of this tape in a joint Trial is shown by the following:

LOPEZ: Yeah (inaudible) Well (inaudible) could sit down and talk to him five minutes alone. (long pause) Let me tell you this, guy get off my fuckin' (inaudible) come up I got to see you, so I go up. *An' alright I got some hash.* He says somethin' went down (inaudible) *a lot of hash.* I say ANDY I said uh people don't want that, ANDY, look see what ya, *if people want the hash. Thirteen hundred dollars a pound for hash,* ANDY I'm telling' you its ridiculous.

As mentioned, the Indictment alleges a single conspiracy dealing in Cocaine and Marijuana. There is no allegation that the Petitioners had any dealings in Hash. The playing of this tape showing Conspiracy Number Two and its interest in Hash is highly prejudicial to the Petitioners.

In the third conversation also on Thursday, April 22, 1976, in the Outer Office at 4:54 P.M., Callahan and Lopez continue to discuss waiting until Monday for a call from either Andy or "The Rock". Again, Lopez indicates Andy's desire to develop an outlet for *Hash*, a controlled substance not alleged in the Indictment.

These three conversations, played in their entirety for the Jury, besides establishing Conspiracy Number Two, prejudiced the Petitioners by interposing Hash into the case. Further, the Petitioners are prejudiced by the transference of guilt and introduction of improper hearsay testimony against them.

CONSPIRACY NUMBER THREE

A third conspiracy, separate and apart from the charged conspiracy and from the others analyzed here, is shown by a conversation at Callahan's Bail Bonding Inner Office on Friday, April 30, 1976, involving Lopez and the Defendant Lauro, at 10:06 A.M. The participants in Conspiracy Number Three are Kenny, the supplier, Lauro and Lopez, the middlemen, and Vito's customers and New York outlets, the distributors. The object of this conspiracy is the distribution of Mexican Marijuana. Conspiracy Number Three is shown by the following:

LAURO: *I made a connection* (inaudible). *The guy got* forty pounds here now. Other words, It's *Mexican*, but wait a minute, he's gonna, go go out he said (inaudible) I to Buddy.

• • •

LOPEZ: Yeah.

LOPEZ: (inaudible) *So what you got, you got forty pounds?*

LAURO: *But he wants a hundred and forty five for this forty.*

LOPEZ: Yeah.

LAURO: And then everything after that is seventy five. That's all I want.

LOPEZ: Just Kenny can't get rid of it or does it belong to Kenny?

LAURO: No, it doesn't belong to Kenny.

LOPEZ: *Kenny can get it.*

LAURO: Yeah.

LOPEZ: Kenny could get it. (inaudible) to Kenny? Or can Kenny go in?

LAURO: I don't know, they want the money when they bring it.

• • •

LAURO: Here's what I got (inaudible) I call 'em. They'll take anything that's halfway decent. Any (inaudible) money. I call for my customers they go out of town, you know, if we get it they (inaudible) dollars.

LOPEZ: You're makin' money.

LAURO: We're makin' money, they went top money (inaudible-both talking).

LOPEZ: I'm gonna get, I'm gonna get *five thousand black widows* and I, I'll give 'em to KENNY, think I'll get 'em tomorrow.

LAURO: Yeah.

LOPEZ: Been bickerin' on the price 'cause he's gonna bring 'em to me from Orlando. *I was gonna put a quarter a piece, KENNY can sell 'em for two dollars a piece.* You know I'll give 'em to KENNY, let him sell 'em and we'll split three ways, me, you and KENNY.

LAURO: They called me yesterday (inaudible) meet the man somewhere, understand, I wanna get some coke (inaudible) like the man told me (inaudible) you know I can't (inaudible) gonna be about ten days, if you wanta wait (inaudible) but the coke is here. That's what he told me yesterday.

• • •

LAURO: *Let's meet KENNY alone*, 'cause we know he can get that for seventy five (inaudible) so you never know, I'm gonna see (inaudible) whenever he comes I'm gonna tell him to get the two (inaudible).

LOPEZ: Yeah.

LAURO: And then later if we get him out we'll *an outlet in New York* and we want four or five hundred pounds a week (inaudible).

LOPEZ: Yeah, I, I may, I may be able, I can talk to my cousin (inaudible) get all the Mexican he wants (inaudible) uh, uh you know, bring it down and I'll borrow five or ten thousand (inaudible) you know.

LAURO: (coughs) (inaudible).

LOPEZ: That's what I'm so close, I'm so close now to gettin' that coke and gettin' (inaudible).

LAURO: (inaudible).

LOPEZ: See he called me yesterday and the guy told me he had *five thousand black widows*. Called KENNY find out what the fuck is goin' on, if I can get 'em for a quarter a piece, five thousand, that's twelve hundred fifty dollars, I can swing that.

LAURO: Yeah.

LOPEZ: See I can get it for (inaudible) turn it around, let KENNY push it in the street, push it for two fifty a piece you know. ANDY was always pesterin' me, or CARL, at twelve fifty, but goddamit, Maddona. (Emphasis added).

This conversation clearly reveals the existence of Conspiracy Number Three involving Lopez and Lauro receiving Mexican Marijuana from Kenny and distributing it to outlets in New York and elsewhere. Again, absolutely no evidence connects this conspiracy to the conspiracy charged in the Indictment. Besides the inherent prejudice already mentioned, the Petitioners are particularly harmed by the discussion between Lopez and Lauro concerning *"black widows"*, an illegal substance not alleged in the Indictment, or mentioned in any other testimony or tapes pertaining to the Petitioners.

CONSPIRACY NUMBER FOUR

This conspiracy involves Lopez and the Government Informant Carl Swartz. Swartz testified that during the conspiracy charged he attempted to make his own illegal deals to raise

money to get himself out of legal problems in the State Court in Fort Myers, Florida. In Conspiracy Number Four, Lopez and Swartz agree to develop Cocaine connections or suppliers on their own so that they will not need anyone else as a supplier. Conspiracy Number Four is shown by Lopez and Swartz at Callahan Bail Bonds Outer Office on Wednesday, May 5, 1976, at 2:09 P.M. The following segment indicates the existence of Conspiracy Number Four and the desire of Lopez and Swartz to keep their illegal activity separate and apart from any persons, including the Petitioners.

SWARTZ: The first time I go over there, the first time I go over there I'll know who to deal is.

LOPEZ: Oh really.

SWARTZ: I got the guy.

LOPEZ: Come on we don't need nobody if we want to do it ourselves. You understand what I'm telling you? I don't need nobody.

SWARTZ: All right. So when I go over with him.

LOPEZ: *We don't need nobody CARL.* The idea is, the reason is because.

SWARTZ: We won't even know about it. I go over with him and have the man meet me, we find them keys of coke and I bring it back.

LOPEZ: Yeah.

SWARTZ: He don't even know about it.

LOPEZ: *In other words we could do the same thing he's doing if we want to, me and you right now.* The idea is that, I wasn't, I wasn't doin' anything, you fell into, you know you work, you scuffle and you worked an all, and then you see a little daylight and you had a chance you came to me and I told you well yeah we could do it. You know. In other words it's, it's let 'em bring it if they want to. But we got, I got the man there. I go to a pay phone and I call him. I call the man up myself, and he send me anything I want now. Anything I want we'll pick it up from the man, but I don't want to do it. Other words I'm doin' this to get you out a jackpot. We both make money. It'll be

easier a little more, OK, all right, so that, but we for us, let him bring it. All right, we'll pay don't take no chances. (Emphasis added).

Clearly Lopez and Swartz indicate their intent to conspire separate and apart from the Petitioners and from all other persons charged in the Indictment. This conversation should not have been admitted into evidence at the Petitioners' Trial because it is proof of a separate conspiracy not charged in the Indictment.

CONSPIRACY NUMBER FIVE

A conversation between Lopez and Swartz at Callahan's Bail Bonds Outer Office on Wednesday, May 5, 1976, at 2:09 P.M., reveals Conspiracy Number Five. Lopez relates to Swartz in narrative form his involvement with unknown persons in Miami. The following segment shows Conspiracy Number Five was ongoing at the same time as the alleged conspiracy and that it was separate and independent of the alleged conspiracy.

LOPEZ: Goddam guy in Miami called and now he ain't called me since I sent, you know, since I told him not to call no more, you know, cause they dealin' themselves. *They are, and, ah, matter of fact he gave me a good deal, you know, in other words, he say so PICO from the other part of it they want, and I told him no. In other words, he says PICO look you can pick yourself up fifteen or twenty thousand, says in other words for me to pick up some extra money.*

SWARTZ: (inaudible).

LOPEZ: I told him naw let it go cause I don't want I don't want to get into it. *I says I'm waitin' for a friend of mine 'cause if he comes through then, ah, then I get with ya'll you know,* (inaudible). He says all right, 'cause I'm givin' them a better deal than they gettin' now. But he gave me a deal 'cause they, they got over loaded and, *ah, and like if for me to pick up fifteen or twenty thousand. All I have to do is call a certain man, and he would have bought it, you know,* I don't know. But I didn't you know, I said look I'd rather wait. I didn't want to get.

SWARTZ: *Too many things goin' at one time.*

LOPEZ: Yeah. (Emphasis).

Here Lopez was in a position to make fifteen or twenty thousand dollars from a source of supply in Miami, separate from the Petitioners. However, he refused this offer because he had other things going. This discussion of large sums of money and unknown persons in Miami is improperly prejudicial to the Petitioners because the Jury considered this evidence against them even though they were not involved in this conspiracy.

OTHER CONSPIRACIES

In a conversation from Callahan Bail Bonds Outer Office on Wednesday, May 12, 1976, at 4:03 P.M., between Lopez and Laura Brannen, another unindicted co-conspirator, the existence of still another conspiracy emerges involving Brannen, Lopez and a person named Frank. This conversation, and the conspiracy revealed by it, is particularly prejudicial to the Petitioners because the entire conversation is nothing more than a narrative and is in no way in furtherance of the conspiracy charged in the Indictment. The following excerpt indicates the prejudice caused to the Petitioners by discussions of pure Cocaine and how to market it.

BRANNEN: FRANK used to tell (inaudible) they made so much money and I said why don't you get in, do it, make your fuckin' money and then get out.

LOPEZ: Get out. Or if, if this guy was gettin' it pure.

BRANNEN: Yeah.

LOPEZ: *He was, he was gettin' it pure?*

BRANNEN: *He did once.*

LOPEZ: *Alright, if he, if he had the inlet to get it pure and he met the right person and he don't even mess with it, in other words, don't put that step on it,* that maxtrose and daxtrose and all that shit, cocaine, don't put that on it, get it pure, just like it is. And he pays the price and he wants to make himself five thousand say over, turn it right over to a certain man, you know, just don't tough it here.

BRANNEN: Yeah. (Emphasis added).

To further complicate the situation presented by the Government's proof showing various conspiracies, there was proof elicited through Swartz and through the recordings that the brothers, John T. and Bryant Bowles, did not want each other to know what they were doing. This certainly does not indicate the existence of one conspiracy with John and Bryant Bowles as the suppliers.

At other times, there were conversations introduced concerning criminal activity not charged in the Indictment and not involving the Petitioners. For example, in a conversation between Lopez on Thursday, May 6, 1976, at 1:47 P.M., Lopez relates about a two pound "flim-flam" deal with sugar involving Buddy. This conversation, in no way related to the conspiracy, but denotes criminal activity and improper conduct. The prejudice to the Petitioners is obvious.

Certainly it would be fundamentally unfair for the Government Informant Carl Swartz, or any other Government witness, *to testify* to activities and participants of conspiracies not charged in the Indictment. Moreover, to allow the same evidence to be introduced in the form of tape recorded conversations, with transcripts not subject to clarification by cross-examination, acts to intensify the unfairness. To further magnify the prejudice, the Petitioners were tried jointly with the participants in the other conspiracies, therefore precluding them from calling these persons as witnesses to explain or clarify the conversations. Significantly, none of the co-defendants, whose voices were heard on the tape, took the stand. The Petitioners were, therefore, left helpless in proving to the Jury that they were in no way aware of or participated in other conspiracies shown by the proof.

As mentioned, *Bertolotti* is the most significant recent decision dealing with the prejudice resulting from a variance between an Indictment charging a single overall conspiracy and proof showing a number of small ones. However, the Fifth Circuit is no stranger to the question of whether the evidence indicates one large conspiracy or several smaller ones. In the recent, significant case of *United States vs. Levine*, 546 F. 2d 658 (1977), the Fifth Circuit articulated quite clearly the standards of proof for a wheel conspiracy, the type alleged and attempted to be proved in Petitioner's case. The Court stated:

> For a wheel conspiracy to exist those people who form the wheel's spokes *must have been aware* of each other and must *do something in furtherance of some single, illegal enterprise*. . . (Citations omitted). If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, *the "wheel" is incomplete*, and two conspiracies rather than one are charged. 546 F. 2d 663 (Emphasis supplied).

As shown, Lopez is the only common link in all the conspiracies shown by the proof. There is absolutely no evidence that those persons who form the spokes of the wheel were aware of each other or did anything in furtherance of some single illegal enterprise. For example, there is no evidence that the Petitioners was aware of Kenny, the supplier in Conspiracy Number Three. Unaware of the activities of these persons, it is clear the Petitioners did absolutely nothing in furtherance of some single illegal enterprise. Since the "spokes" did not interact, the wheel is thus incomplete and multiple conspiracies, rather than one, have been shown.

In *Levine*, the Fifth Circuit also held that proof of a proximate or simultaneous conspiracy with one common conspirator is insufficient to establish the existence of a single conspiracy. This, of course, is the exact situation presented in the case at bar with the one common co-conspirator, Lopez, being the only link between the other conspiracies shown by the proof.

The variance here takes two forms. First, the evidence indicates clearly the existence of at least five major conspiracies separate from the one charged, as well as evidence of other less defined conspiracies. Second, the Indictment alleges the Defendants played certain roles in the single conspiracy. However, the proof shows the roles played by these persons did not coincide with the roles alleged in the Indictment. This second type of variance has also been recognized as improper. See *Berger vs. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Cognizant that not every variance constitutes reversible error, the appropriate inquiry is whether substantial rights of the Petitioners have been affected. Substantial prejudice was caused to the Petitioners here by the variance shown. This prejudice took many forms as follows: (1) the transference of guilt from one conspiracy to another; (2) the use of hearsay testimony pertaining to one conspiracy but admitted generally as to the conspiracy charged; (3) the evidence relating to controlled substances and illegal activity not charged in the Indictment, such as "black widows" and "flim flams", and (4) the inherent inability of the Petitioner to cross-examine at a joint Trial the participants in the conversations introduced into evidence.

Furthermore, in the instant case, as in *Kotteakos vs. United States*, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), the number of Defendants on Trial, the number of unindicted co-conspirators, the length of the Trial, and the nature of the evidence, increase the potential for confusion and prejudice. Moreover, when weighing the prejudice created by the admission of the tape recorded conversations revealing the separate conspiracies, it is extremely important to realize that the full impact of these conversations cannot be felt unless they are actually heard. The language, and tone of voice and content of the tapes, had tremendous impact upon the Jury. It was impossible for the Jury to have separated the hearsay and prejudicial testimony concerning one conspiracy from the evidence concerning the conspiracy charged in the Indictment.

Finally, the *Bertolotti* Court spoke specifically to the prejudice resulting from proof of multiple conspiracies:

> The possibilities of spill-over effect from testimony of these transactions are patent when the number of conspiracies, the number of defendants and the volume of evidence are weighed against the ability of the jury to give each defend- and the individual consideration our system requires. 529 F. 2d 157 (Emphasis supplied).

> While admittedly the tapes may have been probative of the Lucas rip-off, they have no relevance to any of the other transactions proved at Trial. *The prejudicial effect, however, of requiring the Jury to spend two entire days listening to obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics cannot be underestimated.* No defendant ought to have a Jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. With respect to at least five of the Appellants, no such proof was ever convincingly produced. 529 F. 2d 158 (Emphasis supplied).

The state of the Government's evidence with regards to separate conspiracies was distinctly stated by the Government Informant Carl Swartz on May 5, 1976, at 2:09 P.M., at Callahan Bail Bonds Outer Office when Swartz replied as follows to the Defendant Lopez, "Too many things going at one time."

It was fundamentally unfair to have required the Petitioners to be jointly tried in the instant case. As was stated in *Kotteakos*, "numbers are vitally important at Trial especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies." 328 U.S. 772, 66 S. Ct. 1252.

Based on the foregoing the Petitioners would urge this Honorable Court to grant Certiorari for the purpose of determining whether the opinion of the United States Court of Appeals for the Fifth Circuit, based on the actual record of this case, conflicts not only with the pronouncement of this Court in *Kotteakos* and the pronouncement of the Second Circuit in

Bertolotti but also with the Fifth Circuit's own pronouncement in *Levine* such that the construction and interpretation given the facts herein by the Fifth Circuit acted to deprive the Petitioners of a fair trial in violation of their right to due process of law under the Fifth Amendment.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent in that it cannot be reconciled with the decision of this Court in *Kotteakos*, the decision of the Second Circuit in *Bertolotti*, and the Fifth Circuit's own decision in *Levine*. In that the matter involved is of extreme general and national significance and in that the maintenance of uniformity in the administration of criminal justice in the Federal Courts is jeopardized by the decision below, it is, therefore, for all of the reasons listed above, most strenuously urged that this Honorable Court exercise this discretion and grant the Writ.

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ADOPTION OF PETITIONS OF CO-PETITIONERS

The Petitioners hereby adopt by reference those Petitions for Writ of Certiorari filed or to be filed with this Honorable Court by their Co-defendants relating to the same point of law involved herein, except when said Petitions are in conflict with their own.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that a copy of the foregoing Motion has been served upon United States Solicitor General, Department of Justice, Washington, D.C., 20530, and upon the Office of the United States Attorney of the Middle District of Florida, Post Office Box 2841, Tampa, Florida, 33601, by United States Mail, Postage Prepaid, on this the 18th. day of September, 1979.

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Appendix

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
Adrian CUESTA, a/k/a "Andy" Cuesta, Gloria Ophelia Patterson, Eddie R. Callahan, Anthony George Lopez, Jr., John T. Bowles, a/k/a J. T. Bowles, Leo Matassini,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
William L. TAYLOR, Gloria Ophelia Patterson, Anthony George Lopez, Jr., Eddie R. Callahan,
Defendants-Appellants.

Nos. 77-5510, 77-5522.

United States Court of Appeals,
Fifth Circuit.

June 25, 1979.

In two consecutive jury trials before the United States District Court for the Middle District of Florida, Ben Krentzman, J., defendants were convicted of various charges under a ten-count indictment which arose from alleged conspiracies to possess and distribute narcotics and to obstruct justice. Defendants appealed, and the Court of Appeals, Fay, Circuit Judge, held that: (1) the district court's wiretap order was lawful even though it authorized a surreptitious entry for the purpose of installing surveillance devices; (2) testimony supported the district court's finding that certain investigators' reports were unverified summaries of conversations with a confidential informant and, therefore, were not within the Jencks Act; (3) the Government adequately laid a foundation for the admission of certain tape recordings; (4) the evidence amply supported the conclusion that the defendants who were charged with narcotics conspiracy had conspired to participate in a common scheme to import and distribute narcotics; (5) the indictment charging conspiracy to obstruct justice sufficiently stated an offense; (6) neither the statute relating to obstruction of justice nor the statute relating to obstruction of criminal investigation required proof that the witness or source with whom interference was attempted was an informant; (7) the Government's evidence

was sufficient to prove an agreement to obstruct justice and to obstruct criminal investigations; (8) the district court's denial of one defendant's motion for a severance was not an abuse of discretion; (9) the evidence was sufficient to establish that answers given by one defendant before a grand jury were false beyond a reasonable doubt and that defendant knew the answers were false at the time he gave them; (10) there was no error in denying a motion for a bill of particulars, and (11) defendant who received a sentence more severe than that received by his code-fendants was not entitled to relief.

Affirmed.

1. Criminal Law 394.3

Fact that district court's wiretap order authorized surreptitious entry of a certain office for the purpose of installing, maintaining and removing wiretap devices and did not give any guidelines to be followed in such surreptitious entry was not such an abdication of judicial control and supervision as to entitle defendants to suppression of communications intercepted pursuant to the order. 18 U.S.C.A. § 2518; U.S.C.A. Const. Amend. 4.

2. Criminal Law 627.6(4)

Investigators' notes of interviews do not fall under the Jencks Act even if they contain occasional verbatim recitations of phrases used by the person interviewed. 18 U.S.C.A. § 3500(b), (e)(2).

3. Criminal Law 627.6(4)

Whether investigators' memoranda of interviews contain such substantially verbatim recitations as to bring the memoranda under the Jencks Act is a question of fact within the discretion of the trial judge. 18 U.S.C.A. § 3500(b), (e)(2).

4. Criminal Law 627.6(4)

Evidence including testimony of law enforcement agents concerning their procedures during interviews with confidential informant was more than sufficient to support district court's finding that the agents' notes of the interviews were unverified summaries and, therefore, were not within the scope of the Jencks Act. 18 U.S.C.A. § 3500(b), (e)(2).

5. Criminal Law 394.3

Testimony of law enforcement agents concerning procedures used in installing electronic surveillance devices pursuant to a wiretap order the agents' testing of the devices was sufficient to meet Government's burden to establish an adequate foundation for admission of tape recordings of intercepted conversations. 18 U.S.C.A. § 2510 et seq.

6. Criminal Law 394.3

Substantial testimony identifying the voices of all defendants except one, who identified himself during an intercepted telephone conversation, more than satisfied all legal requirements and permitted introduction at narcotics trial of tape recordings and transcripts of intercepted conversations. Fed. Rules Evid. rule 901(b)(5), 28 U.S.C.A.

7. Criminal Law 741(2)

Under the Federal Rules of Evidence, once there is a minimal showing that the witness has some familiarity with the voice which he is to identify, it is for the jury to determine the weight to accord the witness' voice identification testimony. Fed.Rules Evid. rule 901(b)(5), 28 U.S.C.A.

8. Conspiracy 47(12)

Evidence amply supported conclusion that defendants who were charged with conspiracy to possess and distribute narcotics conspired to participate in a common scheme aimed at the single purpose of possessing and distributing narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 21 U.S.C.A. §§ 841(a), 846.

9. Indictment and Information 71.2(1)

An indictment is sufficient if it contains the elements of the offense intended to be charged, sufficiently apprises the accused of the charges he must be prepared to meet and safeguards the accused from possible double jeopardy.

10. Conspiracy 43(6)

Since the essence of conspiracy is unlawful agreement rather than accomplishment of the unlawful objective, it is not necessary that conspiracy indictment allege with technical precision all elements essential to commission of the offense which is the object of the conspiracy, or that the indictment state such object with the detail that would be required in an indictment for the substantive offense.

11. Conspiracy 43(6)

All that is necessary in charging conspiracy is that there be certainty sufficient to identify the offense which the defendants allegedly conspired to commit.

12. Indictment and Information 71.4(3)

Where count which charged five defendants with conspiracy to obstruct justice and obstruction of criminal investigations alleged a common intent to frustrate grand jury proceedings by arranging for the murder of a government informant, obstructing justice by supplying persons under investigation with inside information and by agreeing to provide false testimony and where the count set forth 11 overt acts naming persons, times and places, count was sufficient to specifically inform defendants of the crimes forming the object of the conspiracy and, therefore, count sufficiently stated an offense. 18 U.S.C.A. §§ 371, 1503, 1510.

13. Obstructing Justice 1

Neither the obstruction of justice statute nor the statute relating to obstruction of criminal investigations requires proof that the witness or source with whom interference is attempted be an informant. 18 U.S.C.A. §§ 371, 1503, 1510.

14. Obstructing Justice 1

The statutes which make it an offense to obstruct justice or to obstruct criminal investigations have as their intent to protect individuals who are assisting in a federal investigation or judicial proceeding. 18 U.S.C.A. §§ 371, 1503, 1510.

15. Conspiracy 34

In prosecution under indictment charging five defendants with conspiracy to obstruct justice and obstruction of criminal investigations wherein one aspect of the conspiracy charged was a plan to murder a person who was providing information to the Government, so long as the evidence showed that the prospective murder victim was a source of information to the Government, who provided information to a "criminal investigator" within the meaning of the obstruction of criminal investigations section or served in a capacity within the scope of the section relating to obstruction of justice, a conspiracy to murder the victim fit squarely within the proscription of the sections. 18 U.S.C.A. §§ 371, 1503, 1510.

16. Conspiracy 47(2)

In a conspiracy prosecution, the government is not required to prove the existence of an agreement by direct evidence.

17. Conspiracy 45

Ordinarily, the acts and conduct of the conspirators themselves provide relevant and competent circumstantial evidence of an agreement.

18. Conspiracy 40.1

In a conspiracy prosecution, the government is not compelled to prove that a defendant was familiar with each and every detail of the conspiracy but, rather, that defendant had knowledge of the agreement and associated with the plan in order to promote its success.

19. Conspiracy 47(13)

Evidence including testimony of confidential informant and defendant's own intercepted conversations established with unmistakable clarity the existence of a plan and an association for the purpose of hindering the Government's investigation of narcotics traffic and fully warranted conviction of defendants on charges of conspiracy to obstruct justice and obstruction of criminal investigations. 18 U.S.C.A. §§ 371, 1503, 1510.

20. Criminal Law 618

The rule of criminal procedure which deals with prejudicial joinder requires a trial court to weigh the prejudice attendant on a joint trial against interests of judicial economy. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

21. Criminal Law 1148

On motion for severance of defendants or charges, it is for the trial judge to balance the prejudice attendant upon a joint trial against the interest in judicial economy and absent a showing of abuse of discretion, an appellate court will not substitute its judgment for that of the lower court. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

22. Criminal Law 622(2)

District court did not abuse discretion in denying defendant's motion for a separate trial on count charging defendant and his codefendants with conspiracy to obstruct justice and

obstruction of criminal investigations where, even though defendant was not charged with involvement in related drug conspiracy which led to the alleged conspiracy to obstruct justice and despite defendant's assertion that he had no knowledge of his codefendants' drug activities and that he would be prejudiced by a joint trial at which there was evidence concerning his codefendants' criminal activities, defendant's trial was not unduly complex or lengthy and the district court fully instructed the jury regarding the limited admissibility of coconspirators' statements and cautioned the jury to consider each count and the evidence against each defendant separately. 18 U.S.C.A. §§ 371, 1503, 1510; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

23. Perjury 12

Fact that defendant can postulate unstated premises of the question that would make his answer literally true does not bring an answer that is responsive and false on its face within rule precluding perjury conviction for a literally true but unresponsive response to grand jury inquiry.

24. Perjury 33(8)

Evidence at trial on charge of making false declarations before a grand jury was sufficient for jury to reasonably conclude that defendant's answers before the grand jury were false beyond a reasonable doubt and that defendant knew the answers were false at the time he gave them.

25. Indictment and Information 121.1(1)

The purpose of a bill of particulars is to sufficiently advise a defendant of the charges so that he is enabled to prepare a defense and to avoid surprise at trial and to permit defendant to plead former jeopardy at any subsequent trial.

26. Criminal Law 1149
Indictment and Information 121.1(3)

Decision not to order a bill of particulars is within the discretion of the trial judge and will be overturned only upon a showing of clear abuse of discretion evidenced by actual surprise or other prejudice.

27. Indictment and Information 121.2(1)

In absence of any claim of surprise and where defendant was clearly informed of the charges by detailed language of indictment which set forth his allegedly false grand jury testi-

mony and, when defendant inquired as to which portions of the testimony were alleged to be false, the Government had responded orally that all of the testimony was false, defendant was not entitled to a bill of particulars specifying those portions of the grand jury testimony which provided basis for charging false declarations before a grand jury.

28. Perjury 11(1)

Not every false statement is perjurious; in order for a false statement to be perjurious it must be shown to be material.

29. Perjury 11(2)

The test for materiality of an allegedly perjurious statement is whether the false testimony was capable of influencing the tribunal on the issue before it.

30. Perjury 11(2)

In order for a statement to be material, for purposes of perjury prosecution, the statement need not be material to any particular issue but may be material to any proper matter of inquiry.

31. Perjury 11(7)

Where questioning of defendant before grand jury specifically related to whether defendant had knowledge of efforts by others to obstruct narcotics investigation by preventing a certain informant from continuing to supply information to federal authorities, defendant's answer clearly was capable of influencing the grand jury by preventing further inquiry into circumstances surrounding alleged threats against the informant and, therefore, defendant's declaration in answer to such inquiry was "material," for purposes of perjury statute. 18 U.S.C.A. § 1623.

32. Perjury 33(2)

The issue of intent to commit perjury is to be decided from objective and circumstantial evidence.

33. Criminal Law 983

Fact that defendant's sentence was more severe than that received by codefendants while indictment cast defendant and codefendants in a similar role in narcotics conspiracy did not entitle defendant to have sentence vacated where the sentence was within the statutory limits and no abuse of discretion was demonstrated.

Richard Lazzara, Tampa, Fla. (Court-Appointed), for Cuesta.

Bennie Lazzara, Jr., Tampa, Fla. (Court-Appointed), for Bowles.

Nicholas M. Matassini, Tampa, Fla. (Court-Appointed), for Matassini.

Arthur N. Eggers, Tampa, Fla. (Court-Appointed), for Taylor.

Anthony F. Gonzalez, Tampa, Fla., for Patterson.

Joseph H. Ficarrotta, Tampa, Fla. (Court-Appointed), for Lopez, Jr.

James R. Yon, Tampa, Fla., for Callahan.

Gary L. Betz, U.S. Atty., Jacksonville, Fla., Andrew S. Gordon, c/o T. George Gilinsky, William G. Otis, Washington D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before GOLDBERG, Circuit Judge, SKELTON*, Senior Judge, and FAY, Circuit Judge.

FAY, Circuit Judge:

These two cases come before us on appeal from the United States District Court, Middle District of Florida. Count I of the ten count indictment charged all appellants except William Taylor, with conspiracy to possess and distribute narcotics, in violation of 21 U.S.C. §§ 846 and 841(a) (1976). Count I was the subject of trial in No. 77-5510. Count II charged appellants Callahan, Lopez, Matassini, Patterson and Taylor with conspiracy to obstruct justice, in violation of 18 U.S.C. §§ 371, 1503 and 1510 (1976). Counts III through X alleged false declarations before a grand jury, in violation of 18 U.S.C. § 1623 (1976); Lopez was charged in Count III, Patterson in Count IV, Callahan in Counts V, VI, and VII, and Taylor in Counts VIII, IX and X. Counts II through X were the subject of trial in No. 77-5522.

* Senior Judge of the United States Court of Claims, sitting by designation.

Following consecutive jury trials, appellants were convicted as follows: John T. Bowles, Count I; Callahan, Counts I, II, V, VI and VII; Cuesta, Count I; Lauro,[1] Count I; Lopez, Counts I, II, and III; Matassini,[2] Count I; Patterson, Counts I, II and IV; Taylor,[3] Counts II, VIII and X.

Each appellant has filed a brief in this court urging reversal on multiple grounds. Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, each appellant has adopted the arguments advanced by each co-appellant. For reasons stated herein, we affirm these convictions.

THE FACTS

I. *The Marijuana Conspiracy*

The nature of the alleged conspiracies and the claimed errors requires us to set forth the facts in unusual detail.

The evidence against appellants in the two trials consisted primarily of testimony by Carl Swartz, a confidential informant for the FBI, and taped recordings of conversations among the appellants. Viewing the evidence in the light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), the evidence reveals that on February 25, 1976, Carl Swartz came to Tampa from Fort Myers. On that day, he visited the office of Callahan Bail Bonds where he saw appellants Lopez and Patterson, and met appellant Callahan for the first time.

In early March, while Swartz, Callahan and another man were at a restaurant, appellant Bryant Bowles approached Swartz and introduced himself. After Swartz' companions had departed, Bryant Bowles asked Swartz if he could "move" two hundred pounds of marijuana which Bryant added would arrive in two weeks. Swartz indicated that he thought he could move the marijuana, but first wanted to check. After obtaining assurances from Callahan that it was safe to deal with Bryant, Swartz informed Lopez of his conversation with Bryant and asked if "we could move it." Lopez indicated that the marijuana could be "moved," noting that the asking price of $300 per

1. Lauro does not here appeal his conviction.
2. The trial of Pasquale Matassini on Count II was severed from that of his co-indictees. Matassini was subsequently acquitted of that charge.
3. Taylor was acquitted on Count IX.

pound was too high, but confident that the price would come down after the dealing began.

Later that day, Swartz informed Bryant Bowles that he had spoken to someone who Bryant knew, and indicated that that person said there would be no problem moving the marijuana. Bryant asked if the person Swartz was referring to worked at Callahan's office. Bryant responded "You have no problems" when Swartz answered his question in the affirmative. In addition, Bryant indicated that his brother, J. T. Bowles, would be buying the drugs within two weeks.

During the next week, Swartz met with Bryant almost every day. At one of those meetings, Bryant explained that the marijuana would be flown in from Columbia to the Lake Okeechobee area and then brought to Tampa by truck. During this time, Swartz had several general discussions with Lopez regarding the impending deal with Bryant. Lopez reiterated that they would have no problem disposing of the marijuana. Over the weekend Bryant travelled to Fort Myers with Swartz, and had several discussions with him concerning the marijuana deal, including references by Bryant to the fact that his brother, J. T., would be bringing the drugs into the country.

Upon returning from the weekend in Fort Myers, Swartz again discussed the marijuana with Lopez. Lopez said that they should get the price lowered and that Swartz should tell Bryant that he (Lopez) thought the price was too high. Swartz then met with Bryant and, after some negotiation, Bryant reduced the price to $275 per pound.

In the early part of April, Swartz lost touch with Bryant, but he was able to arrange a meeting with J. T. Bowles. J. T. revealed that he knew of Swartz' deal with Bryant and was willing to continue with it. In addition, J. T. said that he would be bringing in 1,000 pounds of marijuana at least every week and hopefully every four to five days. The price for dealing directly with J. T. would be $225 per pound. Swartz informed J. T. that Lopez was his partner. J. T., while approving of Lopez, said that he preferred to deal with Swartz directly.

Swartz in turn told Lopez of the possibility of obtaining 1,000 pounds at $225 per pound. Lopez told Swartz to stay in touch and that the price would come down even more when

they saw the money. Lopez asked Swartz to arrange a meeting with J. T. so that they could negotiate a lower price, obtain a sample of the marijuana and arrange for the airplane which J. T. needed to import the marijuana.

During this same time, Lopez was attempting to line up other sources of marijuana. On April 6, 1976, appellants Cuesta and Matassini told Lopez that they could obtain 10,000 pounds of marijuana at $225 per pound, but that they had no outlets. All parties then readily agreed to attempt the transaction and split the profits equally.

By April 22, however, Lopez had still been unable to obtain marijuana. Callahan advised Lopez to deal directly with Harry "the Rock" Hoffman and offered to put Lopez in touch with Hoffman.

On April 23, Lopez had a discussion with Patterson at the bond office. Lopez told of the possible deal with the Bowles brothers for 1,000 pounds and Patterson replied, "We know what to do with it". Lopez also mentioned that Swartz was trying to get a half-pound sample which Lopez would give to Patterson.

Thereafter, J. T. arrived at the bond office. His son brought in a sample of marijuana and gave it to Swartz who, in turn, gave it to Lopez for checking. The next day Lopez told Swartz that the marijuana was good. Patterson confirmed that "the stuff was terrific".

The following day, J. T., Lopez, and Swartz discussed the quality of the drugs and Lopez' offer to supply the plane. J. T. agreed to a price of $185 per pound if Lopez provided the plane. J. T. also mentioned that he had 15 kilograms of cocaine which would be imported with the marijuana. Lopez expressed interest in the cocaine and indicated that he would pay up to $7,000 per kilo. After J. T. left, Lopez told Swartz that everything sounded good, especially the cocaine, and that he would try to get a plane. Lopez discussed with Patterson the possibilities for obtaining a plane, but neither one could find someone willing to loan them the proper type of aircraft.

At about this same time (the middle to latter part of April 1976), appellant Lauro approached Swartz and J. T. at a table in

Lopez' bottle club. Lauro asked Swartz if J. T. was the person bringing the "stuff" in and if he (Lauro) "could get in on the action". Swartz referred Lauro to Lopez, and the next morning Lopez told Swartz that they could use Lauro as a driver for $10 per pound.

J. T. told Swartz that he was going to Miami and then to Columbia to complete the arrangements. Swartz did not see J. T. again for about a week. During that week Bryant stayed at Swartz' home. During his stay, Bryant attempted to revive their prior deal for 200 pounds of marijuana. Lopez told Swartz they could still move the 200 pounds for Bryant, but it would be more difficult because of the higher price. Lopez also explained to Swartz that they could do the entire operation themselves, including the importation, but that by dealing through J. T. they would "pay a little more. . . but we don't take no chances."

On May 6, 1976, Lopez told Patterson that it appeared that the deal with J. T. was going to "come off." Lopez' optimism was based on the fact that Swartz had obtained a bank loan to finance the purchase of a plane and that soon J. T. was going to take the aircraft for a dry run. During this conversation with Patterson, Lopez explained that he was trying to help Cuesta and Matassini who were having trouble operating their drug business. Lopez said that he would not talk to either Cuesta or Matassini alone, since they apparently were partners. In spite of this, Lopez spoke to Cuesta and mentioned that the dry run would take place the following day.

On May 12, J. T. reappeared and told Swartz that he had just returned from Columbia. According to J. T., the first "load" would arrive within a week to ten days. Swartz was to receive the second load since the first load had been promised to others. Upon learning that J. T. had returned, Callahan asked Swartz to put him in touch with J. T. Swartz called J. T. and turned the phone over to Callahan. Callahan asked J. T. for the money he owed him and said that if he would "get moving on this deal" he would soon have the money to repay.

Two days later Lopez met with Cuesta and told him that Swartz was promised the second load of 1,000 pounds which was to arrive the following Wednesday. Lopez also mentioned Callahan's part in urging J. T. to stop delaying the shipment. Lopez and Cuesta discussed their inability to obtain sufficient

supplies of drugs and expressed their satisfaction with the possibility of dealing regularly with J. T. through Swartz.

On May 17, Lopez and J. T. met to discuss the upcoming transaction. J. T. explained his problems in getting a plane and preparing it for the trip. A final price of $225 per pound was agreed upon. The two discussed the potential for regular shipments. Lopez stated that he would not "go around" Swartz, but that J. T. should tell Swartz when the shipment has arrived and Swartz would communicate that fact to Lopez. At this time J. T. hoped the shipment would arrive within two to three days.

With the transaction soon to occur, Lopez began to arrange financing. Swartz was present when Lopez telephoned two persons in an effort to obtain the necessary funds. Swartz heard Lopez ask one person for $80,000 and another for $70,000. After making the calls, Lopez told Swartz that both persons had agreed to supply the requested amounts and that they could pick it up at any time.

On June 14, 1976, Swartz met with J. T. J. T. related that the first "load" had arrived, that the plane was paid for, and that the next "load" would go to Swartz and Lopez. Swartz went home and telephoned Lopez to report the results of his meeting and related that they would receive a 700 pound shipment the following week.

In a telephone conversation with Lopez on June 20, Swartz related that "our man's down there" and that he would be bringing back the "tomatoes." Lopez expressed his approval and admonished Swartz to "keep close."

Appellants' planned importation never succeeded, however, because it was intercepted by DEA surveillance. Special Agent John Stevenson, a DEA pilot, testified that while airborne in a helicopter near Fort Lauderdale on June 21, he and his partner observed a Piper Aztec being followed by a customs plane. Stevenson observed the Piper land on a grass landing strip located in a sparsely populated area. There was a pickup truck at one end of the landing, and two individuals were seen moving around the plane. When Stevenson observed the truck beginning to leave, he landed the helicopter so that it blocked the truck from leaving. Upon approaching the plane, Stevenson saw three persons, one of whom he identified as Bryant Bowles.

Within a few minutes, a customs plane piloted by John Warr arrived. Warr looked in the Piper Aztec, smelled marijuana and saw thirteen burlap covered bales of the contraband. Later tests revealed that the plane contained 682½ pounds of marijuana.

II. *The Conspiracy To Obstruct Justice*

Immediately upon his arrival in Tampa in late February, 1976, Carl Swartz became a frequent visitor at the Callahan bail bond business. Swartz noticed that appellant Taylor, then a special investigator for the Florida State Attorney's Office, often came to see Callahan and that the two would have private conversations in Callahan's office. On March 14, Callahan told Swartz that Taylor had discovered Carl Caccamo was a government "stool pigeon," and that everyone should be careful because "the heat was going to come down." Callahan had been close to Caccamo and was disturbed that Caccamo had obtained his release from custody by promising to inform on Callahan and others. Callahan remarked that he considered Caccamo a "dead man."

Swartz, Lopez and Patterson were present at the bond office on March 23, when Callahan told them not to use the office telephones for "any kind of business," because Taylor thought that the phones were tapped.

By early April, Callahan's fear that Caccamo was an informant had deepened. Two judges had told Callahan to be careful of Caccamo and Callahan had his own men checking on Caccamo's activities. Callahan had also received information that Caccamo had caused the recent arrests of Matassini and Cuesta. Callahan noted that Lopez had "a couple dago boys" who were going to break Caccamo's legs and mouth so that he would be unable to talk.

On April 8, 1976, Callahan and Lopez questioned Matassini in an effort to determine if Caccamo had been responsible for his arrest, but Matassini had never heard of Caccamo. Callahan expressed his distrust of Caccamo, stating that he was an undercover agent for both the FBI and the Florida State Attorney's Office. On this same day, Lopez testified before the grand jury that he not only had never sold drugs of any kind, but had never even discussed the possibility of transactions involving marijuana.

About three weeks later, Patterson and Lopez were present in the bond office when Taylor arrived. A general discussion regarding the grand jury investigation ensued. Lopez wondered why the grand jury was interested in him, and Taylor replied that the government thought he was involved in illegal activities. Caccamo was viewed as the culprit.

The next afternoon, Callahan told Taylor that Caccamo was in Virginia. Taylor replied that he was probably with an FBI agent since he had gone there with one. Taylor was convinced that somebody would "get" Caccamo and believed that Caccamo was responsible for both Callahan and Lopez having been called before the grand jury. According to Taylor, the "Feds" thought Lopez was selling cocaine.

The possibility that Carl Caccamo was a government informant continued to plague Callahan and Lopez. Callahan was disturbed that an FBI agent who had been around the bond office had disappeared at the same time Caccamo left town. Callahan also learned that a number of criminal charges pending against Caccamo had been dismissed. When Callahan declared that he would not see Caccamo except to secure repayment of some debts, Lopez cautioned that they should be careful to conceal their knowledge of Caccamo's status as an informant. In Lopez' words, "Don't ever let an informant know [that you know] he's an informant unless you're gonna kill him."

Several days later, Callahan went to dinner with Swartz and his wife. During the meal, Pat Matassini visited the table and a discussion ensued centering on Caccamo. Both Matassini and Callahan expressed dislike for Caccamo. Callahan told Matassini that everything was "set for Saturday"; Matassini replied, "Fine." After Matassini left, Callahan explained that on Saturday he was taking Caccamo for dinner at a Chinese restaurant where Matassini would shoot him to death. Later, after Callahan had left, Swartz made a deal with Matassini whereby, if Swartz caught up with Caccamo first, he would receive a half of the contract price being paid to Matassini for the murder.

At about this time, appellants became increasingly concerned about the grand jury. On May 17, Callahan expressed apprehension about Laura Brannen, one of his employees,

because "She knows my life from A to Z." Callahan's approach to Brannen about her prospective grand jury appearance was not subtle:

CALLAHAN: You don't know nothin' do you honey?
BRANNEN: No, I don't know anything.
CALLAHAN: You better not.
BRANNEN: I don't know nothin'.
CALLAHAN: You wanta live long enough to tell me how much you love me or whatever.

The next afternoon Lopez counseled Swartz on how he should respond if questioned by the grand jury. Lopez told Swartz to answer the nonincriminating questions, but to invoke the Fifth Amendment if they "hit a sore spot." According to Lopez, the government could then offer immunity and Swartz would have to answer.

A short while later, Taylor telephoned Callahan to report that he (Taylor) had been subpoenaed by the grand jury. Taylor arrived at the bond office about half an hour later. He and Callahan speculated about the reason for their having been subpoenaed to testify. Taylor thought that, possibly, he had told Callahan that Caccamo was a federal informant over a telephone line which had been tapped.

On June 16, 1976, Patterson told Lopez to tell Callahan she would reveal all that she knew. Lopez told her to be quiet and to testify that, to her knowledge, he (Lopez) was not involved in any illegal activity.

The prior plan to kill Caccamo having failed, Swartz and Callahan visited Caccamo's girlfriend. Callahan told her that he wanted to see Caccamo within 24 hours—he wanted the money and the ring he had loaned to Caccamo. During the ride back Callahan vowed that he would break both of Caccamo's legs. He was also going to tell Pat Matassini that Caccamo was nearby.

Patterson appeared before the grand jury on August 17, 1976. She denied knowing of Lopez' narcotics activities, ever discussing with Lopez the importation or distribution of marijuana, or offering to obtain a pilot for Lopez.

The following morning, Swartz drove Callahan to his lawyer's office to prepare for Callahan's grand jury appearance. In his testimony before the grand jury, Callahan denied any knowledge of Lopez' narcotics activities, stated that he never offered to contact Harry "the Rock" Hoffman for Lopez in order to facilitate a narcotics transaction, and denied having threatened Caccamo with physical violence. Swartz drove Callahan back to the office after his appearance. When they arrived Callahan swore that he would kill Caccamo.

Later that same day, Taylor was summoned before the grand jury. Taylor testified that he never told anyone that the grand jury was investigating Lopez' narcotics activities and denied having made the statement that somebody will kill Caccamo.

That night Swartz took Callahan to visit Lopez and they discussed the testimony Callahan had given. Taylor telephoned Lopez and they also compared grand jury testimony.

The following day, Lopez cautioned Swartz to be sure to have an attorney if he was subpoenaed and to forget everything about their aborted marijuana transaction and the meetings they had with J. T.

On August 25, 1976, Swartz, while fitted with a body microphone and tape recorder, spoke to Callahan regarding Caccamo. Callahan expressed his overriding desire to kill Caccamo regardless of whether he himself were to be imprisoned or executed for the murder. Callahan blamed Caccamo for placing a "bug" in his office, because it was only through such a device that the government could have learned that Taylor told Callahan that Caccamo was an informant. Throughout the remainder of August, Callahan, in his daily contacts with Swartz, continued to refer to informant Caccamo as the cause of their problems.

On September 14, Swartz had one last meeting with Lopez in which Lopez emphasized that, as long as neither one of them testified, no case could be made against them.

THE LAW

I. INTERCEPTED COMMUNICATIONS

[1] The paramount issue of these appeals deals with the propriety of certain language contained in the Title III wire tap order. The bulk of the government's cases against these individuals stems from recordings of their conversations.

On March 31, 1976, Judge Hodges of the United States District Court, Middle District of Florida, signed an order authorizing interception of oral communications based upon an application and an affidavit in support of the application. Pursuant to that order, interception of communications at Callahan's Bail Bonds began on April 1, 1976. Subsequently, two extension orders were granted based on information developed from the intercepted communications. The interception was conducted after the installation of two in-office listening devices in the telephones at Callahan's business office. Interception of communications at Callahan's Bail Bonds continued until May 26, 1976.

All appellants urge that the trial court erred in not granting their motion to suppress these communications. In particular, appellants claim that the order authorizing the placement of listening devices in the Bail Bond office, which by its terms authorized surreptitious entry for the purpose of installing, maintaining and removing these devices, was too broad in that the order failed to give guidelines to be followed in such entries. This resulted, appellants argue, in an unconstitutional abdication of judicial control and supervision by allowing prosecutorial and investigative personnel to determine their Fourth Amendment rights.

We have held these matters in abeyance pending the Supreme Court's ruling in *Dalia v. United States*, — U.S. —, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979), as all parties agreed this resolution would probable provide the controlling authority. The Supreme Court has now spoken and specifically rejected appellants' contentions.

The petitioner in *Dalia* raised the same issues as appellants here. The Court in clear direct language disposes of all of these contentions. It rejects any basis for a constitutional rule proscribing covert entries. The Court recognized that while

> "Title III does not refer explicitly to covert entry. The language, structure, and history of the statute, however, demonstrate that Congress meant to authorize courts—in certain specified circumstances—to approve electronic surveillance without limitation on the means necessary to its accomplishment, so long as they are reasonable under the circumstances,"

— U.S. at —, 99 S.Ct. at 1689, and then concluded:

> "We make explicit, therefore, what has long been implicit in our decisions dealing with this subject: The Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment."

Id.

The Supreme Court emphasizes that any other interpretation of Title III or 18 U.S.C. § 2518 would "thwart" the Congressional purpose. The opinion also rejects totally any notion that the warrant or order must set forth the procedures to be followed by the executing officers. It repeats that both bugging and wire-tapping forms of surveillance are covered by the procedures used *sub judice* and the receipt of evidence thereby obtained.

II. JENCKS ACT

Agent Arwine testified that he met with Swartz on three occasions. Agent Kinne testified that he had almost daily contact with Swartz between February and September, 1976. Both agents took notes during the interviews from which they prepared memorandum reports. After preparing their memoranda, the agents destroyed their original notes.

Arwine stated that although he took notes during their meetings, he did not take down verbatim what Swartz had told him, he made no attempt to "get down the exact words" of Carl Swartz, and did not show these notes to Swartz nor read them back to Swartz in order to verify their accuracy.

Agent Kinne testified that he attempted to take accurate notes during his many interviews with Swartz. He noted that there may have been one or two occasions when he "put down a

quotation," but that he never read back his notes to Swartz in order to verify their accuracy. When asked whether the memoranda which he prepared from his notes were ever used to prepare Swartz for his trial testimony, Kinne noted that the interviewing attorneys had used the memoranda "to refresh their recollection so that they could properly interview him." All appellants join in the assertion that the trial court committed reversible error in denying defense requests to order the government to produce these memoranda. Appellants claim that these were Jencks Act statements, discoverable under 18 U.S.C. § 3500(b) and (e)(2), which provide in relevant part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * * *
>
> (e) The term "statement", as used in subsection (b)...of this section in relation to any witness called by the United States, means—...(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

[2-4] The district judge denied defendant's motion to order production of the memoranda and declined to screen the memos *in camera* finding that they were "not verbatim", but rather accurate "summaries" of the conversations with Swartz. The record shows that none of the reports were adopted or otherwise authenticated by the witness. As this Court has noted, "[i]nvestigators' notes of interviews do not fall under the [Jencks] Act even if they contain 'occasional verbatim recitations of phrases used by the person interviewed.' " *United States v. Hodges*, 556 F.2d 366, 368 (5th Cir.), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1977), *quoting United States v. Cruz*, 478 F.2d 408, 413 (5th Cir. 1973). Moreover,

whether the memoranda contain such substantially verbatim recitations as to bring the memoranda under the act is "a matter of fact within the discretion of the trial judge." *Id.* The testimony in the record is more than sufficient to support the district court's finding that the reports were unverified summaries and therefore not statements within the Jencks Act. *See United States v. Judon*, 581 F.2d 553, 554-556 (5th Cir. 1978) (FBI reports prepared from notes taken during interviews with witness, not producible under Jencks Act).

III. TAPES AND TRANSCRIPTS

[5] At trial, foundation for the admission of the tape recordings was provided by Agent Kinne, who directed the interception at the bond office, Agent Roberts, who was in charge of the Lopez telephone intercept, Agent Batley, who participated in the installation of the two microphones at the bond office, the agents who monitored the conversations and Agent Buresh, who as a frequent visitor to the bond office, provided some of the voice identifications.

Cuesta and Matassini urge that the government failed to establish an adequate foundation for admission of the tapes. In particular, Cuesta argues that the government failed to establish the accuracy of the tape recordings. Both Cuesta and Matassini assert that the government failed to adequately identify their voices on the tapes.

While this Court has rejected the adoption of "any formulistic standard to guide the admissibility of tapes and transcripts," *United States v. Greenfield*, 574 F.2d 305, 307 (5th Cir. 1978), we have noted that the party seeking introduction of a sound recording into evidence must "go forward with respect to the competency of the operator, the fidelity of the recording equipment, the absence of material deletions, additions, or alterations in the relevant portions of the recording, and the identification of the relevant speakers." *United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977).

This burden has been met by the government. Both agents Kinne and Roberts testified that prior to the commencement of their respective surveillances, monitoring agents were instructed on the use of the recording machines. Agent Batley, technical coordinator for the Tampa Division of the FBI, testified that the monitoring agents all had experience in operating the equip-

ment used on this case and that he personally instructed them on the use of the equipment. The monitoring agents also testified to having received instruction on the operation of the recording machines prior to commencement of the interceptions.

Agent Batley, who participated in the installation of the microphones in the bond office, testified that he tested the microphones by using a "lineman's test set," and that before any interception occurred, he tested the recording machines. Batley noted that the microphones and the recording machines were operating properly. Similarly, Batley described how he connected the Lopez telephone intercept and verified that he had, in fact, tapped the proper line. The Lopez tape recording machines were tested prior to their use by monitoring agents.

Two recording machines for each intercept were activated by a single switch. This set-up allowed for the simultaneous recording of two sets of tapes. Logs were maintained by the monitoring agents as the conversations were taking place. Agent Kinne compared these logs with the tapes in order to verify the accuracy of the tapes. In addition, one copy of each original was sealed by the court. The duplicate tape was used to prepare the trial tape. Kinne testified that he compared the trial tape to the duplicate in a check for accuracy.

The agents responsible for making and maintaining custody of the tapes testified that they were not altered or edited except to the extent that certain portions were chosen for the trial tape. Moreover, it appears that appellants used the tapes at trial to play additional portions of the tapes which were not played by the government. Coupled with our resolution of the voice identification issue set forth below, we hold that this evidence met the government's burden as outlined in *Biggins* and the tapes were properly admissible.

[6] Rule 901(b)(5) of the Federal Rules of Evidence provides that voice identification may be made "by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." At trial, agent Buresh, who had been a frequent visitor to the bond office, identified the voices of Patterson, Lopez and Callahan based on his conversations with them. Kinne identified all the remaining appellants except J. T. Bowles based upon their references to each other by

name and also upon personal interviews with appellants. J. T. Bowles identified himself during a telephone conversation made from the bond office. In addition, Kinne, who prepared the tape transcripts used at trial, also testified that his identification of particular parties on the transcript was based on observations of the traffic at the bond office and interviews with the appellants. No objection was made to the transcript identifications at trial.

[7] These identifications were sufficient to sustain introduction of the tapes and transcripts at trial. Rule 901(b)(5) merely requires that the witness have some familiarity with the voice which he identifies. *See United States v. Ladd*, 527 F.2d 1341 (5th Cir. 1976). Once this minimal showing has been made, the jury determines the weight to accord the identification testimony. *See United States v. Knohl*, 379 F.2d 427 (2d Cir.), *cert. denied*, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967); *pilcher v. United States*, 113 F. 248 (5th Cir. 1902). With or without objection, the substantial testimony identify the voices of all appellants except J. T. Bowles, more than satisfies all legal requirements. J. T. provided his own identification.

IV. COUNT I: SUFFICIENCY

[8] J. T. Bowles argues that the evidence reveals the existence of at least five separate conspiracies, not the single conspiracy to import and distribute controlled substances as charged in Count I of the indictment. Based on this characterization of the evidence, Bowles urges that failure of the trial court to grant his motion for severance and for judgment of acquittal resulted in the transference of guilt amongst members of the various conspiracies to his detriment.

Matassini claims that the proof at trial showed a scheme significantly different from that charged in the indictment. Matassini notes that the indictment casts him and Cuesta in the role of purchaser, whereas the evidence showed they were suppliers. This, he urges, constitutes a fatal variance which should have resulted in the granting of his motion for judgment of acquittal for insufficiency of the evidence.

We have examined this lengthy record with respect to the evidence concerning each individual defendant and are convinced that there is ample evidence to support the conclusion that appellants charged in Count I conspired to participate in a

common scheme aimed at the single purpose of possession and distribution of narcotics. As to Matassini's contention, the evidence showed that while he and Cuesta originally contemplated selling and/or distributing 10,000 pounds of marijuana to Lopez and Swartz, when Cuesta and Matassini had trouble obtaining adequate supplies of marijuana, they were more than willing to make regular purchases from J. T. Bowles through Swartz. This evidence is certainly sufficient to sustain the charge of conspiracy.

V. COUNT II: ADEQUACY, IMPOSSIBILITY, SUFFICIENCY

Count II charged Lopez, Callahan, Taylor, Patterson and Matassini with conspiracy to violate 18 U.S.C. §§ 1503 (obstruction of justice) and 1510 (obstruction of criminal investigations), in violation of 18 U.S.C. § 371. Count II charged two aspects of the conspiracy. First, Count II charged that Taylor, then a special investigator for the Florida State Attorney's Office, passed information to Callahan concerning federal investigations, including the fact that Carl Caccamo was a federal informant. Continuing, the count charged that Callahan attempted to arrange the murder of Caccamo. Second, it alleged that the conspirators agreed to give false testimony to the grand jury and withhold information.[4]

4. Count II of the indictment reads:

COUNT TWO

From on or about January 1, 1976, and continuing to on or about the date of the return of this indictment, at Tampa, Florida, in the Middle District of Florida and elsewhere,

WILLIAM L. TAYLOR;
EDDIE R. CALLAHAN;
ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez;
PASQUALE MATASSINI, a/k/a "Pat" Matassini; and
GLORIA OPHELIA PATTERSON

did willfully, knowingly, intentionally and unlawfully conspire, combine, confederate and agree together and with each other and with other persons both known and unknown to the Grand Jury, to commit an offense against the United States; that is, to violate Title 18, United States Code, Sections 1503 and 1510.

It was a part of said conspiracy that WILLIAM L. TAYLOR, EDDIE R. CALLAHAN and ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, would corruptly endeavor to influence, intimidate and impede witnesses who were to appear before the Federal Grand Jury in Tampa, Florida.

It was a further part of said conspiracy that WILLIAM L. TAYLOR would advise EDDIE R. CALLAHAN of the identity of a confidential informant for the Federal Bureau of Investigation and that EDDIE R. CALLAHAN would arrange for PASQUALE MATASSINI, a/k/a "Pat"

1. *Adequacy*

Appellant Taylor contends that the district court erred in failing to grant his motion to dismiss Count II of the indictment on the grounds that the indictment failed to adequately describe many of the necessary elements of the offense. We cannot agree.

4. Count II of the indictment reads: *Cont.*

Matassini, to murder said informant.

It was a further part of said conspiracy that WILLIAM L. TAYLOR would disclose to EDDIE R. CALLAHAN the nature of investigations being conducted by the Federal Bureau of Investigation and the Federal Grand Jury in Tampa, Florida.

It was a further part of said conspiracy that WILLIAM L. TAYLOR, EDDIE R. CALLAHAN, ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, and GLORIA OPHELIA PATTERSON would corruptly endeavor to influence, obstruct and impede the due administration of justice by discussing among themselves testimony to be given by each of them before the Federal Grand Jury in Tampa, Florida, and they knowingly agreed to make false declarations and to withhold information from said Grand Jury.

It was a further part of said conspiracy that ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, would corruptly endeavor to influence, obstruct and impede the due administration of justice by instructing Carl Swartz to refuse to testify before the Federal Grand Jury in Tampa, Florida.

In furtherance of the conspiracy and to achieve and effect the objects of the conspiracy, at least one of the defendants committed at least one of the following overt acts:

OVERT ACTS

1. On or about March 14, 1976, WILLIAM L. TAYLOR advised EDDIE R. CALLAHAN at Callahan Bail Bonds in Tampa, Florida, that Carl Caccamo was a "stoolie" for the Federal Bureau of Investigation, and further advised EDDIE R. CALLAHAN to proceed with caution because, "The heat is going to come down."

2. On or about April 8, 1976, ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, appeared before a Federal Grand Jury at Tampa, Florida, and concealed information by knowingly making false declarations, as charged in Count Three of this indictment, concerning his participation in drug trafficking.

3. On or about April 30, 1976, at Callahan Bail Bonds in Tampa, Florida, WILLIAM L. TAYLOR met with EDDIE R. CALLAHAN to advise him that "the Feds" were investigating "Pico" LOPEZ for dealing in cocaine.

4. On or about May 11, 1976, EDDIE R. CALLAHAN, and PASQUALE MATASSINI, a/k/a "Pat" Matassini, met at the Maison Rouge restaurant on Dale Mabry Highway, in Tampa, Florida, and planned to assassinate or "hit" Carl Caccamo.

5. On or about May 18, 1976, EDDIE R. CALLAHAN and WILLIAM L. TAYLOR met at Callahan Bail Bonds in Tampa, Florida and discussed the possibility of a "wire tap" on the telephone at that office, and how they would testify at their Federal Grand Jury appearance at Tampa, Florida.

[9-11] An indictment is sufficient if it "contains the elements of the offense intended to be charged," sufficiently appraises the defendant of the charges he must be prepared to meet, and safeguards the accused from possible double jeopardy. *Russel v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); *United States v. Martinez*, 496 F.2d 664, 669 (5th Cir.), *cert. denied*, 419 U.S. 1051, 95 S.Ct. 627, 42 L.Ed.2d 646 (1974). In that the essence of conspiracy is unlawful agreement rather than accomplishment of the unlawful objective, *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975),

> it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, . . . or to state such object with the detail which would be required in an indictment for committing the substantive offense.

Wong Tai v. United States, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545 (1927) (citations omitted). *Accord, United States v. Evans*, 572 F.2d 455, 483 (5th Cir. 1978); *United States v. Fischetti*, 450 F.2d 34, 40 (5th Cir.), *cert. denied*, 405 U.S. 1016, 92 S.Ct. 1290, 31 L.Ed.2d 478 (1971); *Brown v. United States*, 403 F.2d 489 (5th Cir. 1968). All that is necessary in charging conspiracy is "certainty, to a common intent, sufficient to identify the offense which the defendants conspired to commit . . ." *Williamson v. United States*, 207 U.S. 425, 447, 28 S.Ct. 163, 171, 52 L.Ed. 278 (1908); *Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 71 L.Ed. 545 (1926).

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4. Count II of the indictment reads: *Cont.*

6. On or about June 16, 1976, "Pico" LOPEZ had a telephone conversation with GLORIA OPHELIA PATTERSON in which he advised her to conceal and cover up his activities concerning the possession and distribution of controlled substances.

7. On or about July 15, 1976, EDDIE R. CALLAHAN traveled to the home of Carl Caccamo's girlfriend and told her to tell Carl Caccamo he had better contact him or he was going to "bust" Caccamo up with a baseball bat.

8. On or about August 17, 1976, GLORIA OPHELIA PATTERSON appeared before a Federal Grand Jury at Tampa, Florida, and concealed information by knowingly making false declarations, as charged in Count Four of this indictment, concerning her discussions with "Pico" LOPEZ.

9. On or about August 18, 1976, at Callahan Bail Bonds in Tampa, Florida, ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, told Carl Swartz that if he was called before the Grand Jury in Tampa and asked about J. T. BOWLES, he should "keep his mouth shut."

10. On or about August 18, 1976, EDDIE R. CALLAHAN appeared before a Federal Grand Jury at Tampa, Florida, and concealed information by knowingly making false declarations, as charged in Counts Five through Seven of this indictment.

11. On or about August 18, 1976 WILLIAM L. TAYLOR appeared before a Federal Grand Jury at Tampa, Florida, and concealed information by knowingly making false declarations as charged in Counts Eight through Ten of this indictment.

All in violation of Title 18, United States Code, Section 371.

[12] Count II meets and exceeds this standard. It alleges a common intent to frustrate the proceedings of the grand jury by arranging for the murder of a government informant, obstructing justice by supplying persons under investigation with inside information, and by agreeing to provide false testimony. Coupled with the eleven overt acts set forth in Count II, naming persons, times and places, appellants were specifically informed of the crimes forming the object of the conspiracy. Accordingly, appellants argument must fail as Count II sufficiently stated an offense.

2. *Impossibility*

As previously mentioned, one part of the conspiracy was the plan to murder Carl Caccamo, who was providing information to the government. Appellant Taylor claims that the government failed to prove that Caccamo was, in fact, an informant and therefore, his motion for a judgment of acquittal should have been granted. Appellant Taylor, however, misreads the statutes involved.

[13-15] Neither 18 U.S.C. §§ 1503 nor 1510 requires proof that the witness or source with whom interference is attempted be an informant. Adoption of appellant Taylor's limited interpretation of these statutes would frustrate the clear intent of the statutes—that is, to protect individuals assisting in a federal investigation or judicial proceeding. We hold that so long as the evidence showed Caccamo to be a source of information to the government, providing information to a "criminal investigator" as provided in 18 U.S.C. § 1510, or serving in a capacity as provided in 18 U.S.C. § 1503, a conspiracy to murder him fits squarely within the proscription of 18 U.S.C. § 1503 and 1510, as provided in the indictment.

3. *Sufficiency*

Appellants Taylor and Callahan contend that the government's evidence was insufficient to prove an agreement among those charged in Count II. We cannot agree.

[16-18] We note at the outset that the government is not required to prove the existence of an agreement by direct evidence. Ordinarily, the acts and conduct of the conspirators themselves provide relevant and competent circumstantial evidence of an agreement. *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978). In addition, the government is not compelled to prove that a defendant was familiar with each and every detail of a conspiracy, but rather, that a defendant had knowledge of the agreement and associated with the plan in order to promote its success. *Id.* at 469.

[19] In this case, the testimony of Swartz and the appellants' own taped conversations show with unmistakable clarity that there was a plan and an association for the purpose of hindering the government's investigation. The plan did not take the form of one joint action but rather multiple actions for the purpose of achieving one overall objective. *See United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1975).

The record reveals that Lopez, Patterson and Callahan were connected to the distribution conspiracy charged in Count I. Taylor, privy to investigative information through his position in the Florida State Attorney's Office, told Callahan that Caccamo was an informant for the FBI and that indictments would be forthcoming. Taylor also related that because of the information provided by Caccamo, most of the people from the bond office would be called before the grand jury. Taylor told Lopez that the government thought Lopez was dealing in cocaine. In addition; Taylor informed Callahan that his telephones were tapped.

Callahan responded to this information by hiring Pat Matassini to kill Caccamo in order to prevent Caccamo from giving further information to federal authorities regarding illegal activities at the bond office. Although the plan failed, it was not due to a lack of diligence in attempting to find Caccamo. Upon hearing of their impending grand jury appearances, appellants took action to ensure that any incriminating

information would be withheld. Callahan cautioned both Lopez and Lauro Brannen to forget what they knew about him. Lopez told Swartz to refuse to answer when the grand jury "hit a sore spot." Lopez also told Swartz to forget about their dealings with J. T. Bowles, and told Patterson to testify that, to her knowledge, he was not involved in any illegal activity. Finally, Callahan, Taylor, Lopez and Patterson all gave false testimony regarding their knowledge of the conspiracy (marijuana and cocaine) and the attempts to kill Caccamo. In short, the government's evidence of the conspiracy charged in Count II was abundant, clear and convincing. This is a case where the "record fairly shrieks the guilt" of appellants charged in Count II. *Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953).

VI. SEVERANCE

Appellant Taylor urges that the trial court erred in denying his motion for a separate trial on Count II. Taylor, it must be recalled, was not charged with involvement in the drug conspiracy. Rather, Taylor was tried in No. 77-5522 with conspiracy to obstruct justice and false declarations before a grand jury. Taylor asserts that he had no knowledge of his co-defendants drug activity and that a joint trial in which he was faced with proof of his co-defendants false declarations based upon unrelated criminal activities necessarily caused him prejudice.

[20, 21] Rule 14 of the Federal Rules of Criminal Procedure speaks to the issue of prejudicial joinder and is couched in terms which require a trial court to weigh the prejudice attendant to a joint trial against interests of judicial economy. Fed.R.Crim.P. 14. This balancing process, which requires severance of defendants or charges as the needs of justice dictate, is committed in the first instance to the sound discretion of the trial judge. *United States v. McLaurin*, 557 F.2d 1064, 1074-75 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 743, 54 L.Ed.2d 767 (1978). Absent a showing by defendant of abuse of that discretion, an appellate court will not substitute its own judgment for that of the lower court. *See Schaffer v. United States*, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960).

[22] Taylor's trial was not unduly complex or lengthy. There were only three other defendants. The district court instructed the jury regarding the limited admissibility of co-conspirator statements and cautioned the jury, both before the

playing of the tapes and during final instructions, to consider each count and the evidence against each defendant separately. Under these circumstances, we cannot find that the district court's denial of Taylor's motion for severance constituted an abuse of discretion.

VII. TRUTH AND PERJURY

Taylor challenges his conviction for false declarations before a grand jury arguing that the statements upon which Count VIII was based were literally true. Taylor testified to the grand jury as follows:

BY MR. HOGUE:
Q. What about Pico Lopez?
A. Well I have certainly never interceded for Pico Lopez, sir, on any type of matter.
Q. You never passed on the fact that there was a Federal Grand Jury investigating his narcotics activities?
A. No, sir. Never. In fact, I have no knowledge that that has ever been a fact. But had I did (sic) have any knowledge to that effect I would certainly not pass it on to him or to anyone.
BY MR. JAMES:
Q. Well have you ever speculated to anyone that we were conducting an investigation into Pico's narcotics activities?
A. No, sir.

At trial, the government produced the following transcript of a conversation between appellant Taylor and Eddie Callahan at the Callahan Bail Bond office:[5]

Callahan: No, no more, listen, after awhile, I had, I mean I don't I don't want no part of the mother _____ (Caccamo).
Taylor: He's responsible for you bein' before that _____ Grand Jury.
Callahan: I imagine so.
Taylor: He's responsible for Pico being down there.
Callahan: Yeah.
Taylor: Let one tell ya somethin', now you can tell Pico this, they think he's dealing in _____ cocaine an' _____
Callahan: Who?

5. We have used blanks as a substitute for the profanity which peppers these transcripts.

Taylor: The feds.
Callahan: They uh, Pico—uh Carl Caccamo's runnin' cocaine?
Taylor: No, the feds think Pico is.
Callahan: Aw.
Taylor: Yeah, I'm tellin' you.

The essence of Taylor's appellate argument is that at no point did Taylor tell Callahan what the grand jury was investigating. Taylor explains the transcript by noting that the word "feds" could encompass numerous federal agencies and investigative bodies, whereas the questions which he answered before the grand jury only referred to the investigation of the grand jury.

[23] Taylor relies on *Bronston v. United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), to support his reasoning. In *Bronston*, the Supreme Court reversed appellants perjury conviction under 18 U.S.C. § 1621 where appellants grand jury answer was literally true, but unresponsive. The Court noted that the conviction would have to be reversed even if appellant intentionally misled his questioner by his answer and even if his answer is "false by negative implication." However, an answer that is responsive and false on its face does not come within *Bronston's* literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true. *United States v. Kehoe*, 562 F.2d 65, 68-69 (1st Cir. 1977). Similarly, *Bronston* does not deal with the situation where a defendant has given a "yes or no" answer, the truth of which can be ascertained only in the context of the question posed. *United States v. Chapin*, 169 U.S.App.D.C. 303, 309, 515 F.2d 1274, 1280 (1975). *Bronston* considered only the situation where a declarative statement made to a grand jury was true no matter what the context in which it was given.

[24] Appellant's *Bronston* analysis suffers from another serious flaw. In *Bronston*, the grand jury statement was nonresponsive, deliberately misleading but true. In this case, appellant's grand jury testimony was responsive but deliberately false. Taylor alleges that his statement to Callahan about the "feds" is ambiguous. But this was a decision for the jury. Considering the context of the Taylor-Callahan conversation, the jury could reasonably conclude that Taylor related to Callahan that the federal grand jury was investigating Lopez' narcotics activity, that the appellant's answers before the grand jury were

false beyond a reasonable doubt, and that defendant knew the answers to be false at the time he gave them. *See United States v. Parr*, 516 F.2d 458 (5th Cir. 1975).

VIII. COUNT VIII—BILL OF PARTICULARS

During hearings on pre-trial motions, Taylor requested a bill of particulars, specifying those portions of the grand jury testimony forming the basis for Count VIII. Denial of the bill of particulars, Taylor asserts, constituted a denial of due process.

[25, 26] The purpose of the bill of particulars is to sufficiently advise a defendant of the charges to enable him to prepare a defense and avoid surprise at trial, and to enable him to plead former jeopardy at a subsequent trial. *United States v. Cantu*, 557 F.2d 1173, 1178 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978). The decision not to order a bill of particulars is within the discretion of the trial judge and will be overturned only upon a showing of clear abuse of discretion evidenced by actual surprise or other prejudice. *Id.*

[27] Taylor was clearly informed of the charges by the detailed language of the indictment which set forth his grand jury testimony. When Taylor inquired as to which portions of that testimony were alleged to be false, the government responded orally that all of the testimony was false. Taylor makes no claim of surprise, but merely concludes the rambling" nature of his testimony worked to deprive him of due process. There can be no doubt that the subject matter of the offense was sufficiently described to allow him to plead former jeopardy in the event of a later prosecution. Where, as here, the indictment sets forth the false testimony, all of which was alleged to be false, there is no error in denying a motion for a bill of particulars.

IX. COUNT IX—MATERIALITY

Appellant Taylor urges that the trial court erred in not granting his motion for a judgment of acquittal on Count X. While appellant concedes that his testimony was false, he now questions the materiality of the testimony.

[28-30] Not every false statement is perjurious. In order for a false statement to be perjurious, it must be shown to be "material." The test for materiality is whether the false testimony was capable of influencing the tribunal on the issue

before it. *United States v. Abrams*, 568 F.2d 411, 420 (5th Cir. 1978); *United States v. Brumley*, 560 F.2d 1268 (5th Cir. 1977). However, as we have recently noted, "the statements need not be material to any *particular* issue but may be material to any proper matter of inquiry." *United States v. Abrams*, 568 F.2d 411, 420 (5th Cir. 1978) (emphasis in original). This was amplified when we approved the following language from *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970):

> A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.

Id.

The grand jury testimony at issue here is:

Q. Did you ever tell Eddie Callahan that "somebody will get Carl Caccamo?"
A. Never.

The government's proof as to the falsity of this response was a taped conversation between appellant Taylor and Eddie Callahan, wherein they stated:

Callahan: Well, called his house an' wasn't there and uh he said he was gonna call my house, but he never did call my house, I haven't heard from the _____ period, the mother _____.
Taylor: Somebody'll get him.
Callahan: Huh?
Taylor: Somebody'll get him.
Callahan: Oh yeah. _____ yeah, you know there been rumbles goin' all over town. Whatever, you know....

[31] In addition to introducing these statements into evidence, the government presented testimony from an assistant united States attorney who participated in the grand jury investigation. He testified that the grand jury was conducting an investigation of Lopez' drug operation and possible obstruction of justice in connection with the investigation of Lopez. The questioning of Taylor specifically related to whether he had knowledge of efforts by others to obstruct both aspects of the

investigation by preventing Caccamo from continuing to supply federal authorities with information. Clearly this was capable of influencing the grand jury by preventing further inquiry into the circumstances surrounding the threats to Caccamo. Taylor's motion for acquittal on Count X was, therefore, properly denied.

[32] Appellant Taylor's final contention concerns the element of intent involved in false swearing. He argues that his motion for judgment of acquittal on Count X should have been granted because the government failed to prove that the false statement was knowingly and intentionally made. The issue of intent is to be decided from objective and circumstantial evidence. *Communications Association v. Douds*, 339 U.S. 382, 411, 70 S.Ct. 674, 94 L.Ed. 925 (1950). Simply put, the jury did not buy Taylor's explanation of the circumstances. We will not disturb that finding.

X. MATASSINI'S SENTENCE

[33] Matassini contends that his sentence, although within the limits prescribed by statute, should be vacated by this Court exercising its supervisory power, because the sentence is more severe than that received by codefendants Cuesta and Lauro. Matassini's argument is based on the fact that the indictment cast all three in a similar role in the conspiracy. We reject this contention since the sentence is within the statutory limits and Matassini has demonstrated no abuse of discretion which would entitle him to relief. *See, e. g., United States v. Hayes*, 589 F.2d 811, 827 (5th Cir. 1979); *United States v. Deaton*, 477 F.2d 65 (5th Cir.), *cert. denied*, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973); *United States v. Johnson*, 476 F.2d 1251, 1258 (5th Cir. 1973).

CONCLUSION

Finding all the verdicts amply supported by sufficient evidence and the alleged errors without merit, the convictions are affirmed.

Affirmed.

No. 77-5510

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ADRIAN CUESTA, a/k/a "Andy" Cuesta, GLORIA OPHELIA PATTERSON, EDDIE R. CALLAHAN, ANTHONY GEORGE LOPEZ, JR., JOHN T. BOWLES, a/k/a J. T. Bowles, and LEO MATASSINI,
Defendants-Appellants.

No. 77-5522

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
WILLIAM L. TAYLOR, GLORIA OPHELIA PATTERSON, ANTHONY GEORGE LOPEZ, JR., and
EDDIE R. CALLAHAN,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

ON PETITIONS FOR REHEARING

(August 13, 1979)

Before GOLDBERG, Circuit Judge, SKELTON*, Senior Judge, and FAY, Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

* Senior Judge of the United States Court of Claims, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 77-18-CR-T-2-15-77

VIOLATIONS:
18 USC 371
21 USC 846
18 USC 1623

UNITED STATES OF AMERICA
v.
ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez; EDDIE R. CALLAHAN; WILLIAM L. TAYLOR; JOHN T. BOWLES, a/k/a J. T. Bowles; BRYANT W. BOWLES; LEO MATASSINI, PASQUALE MATASSINI, a/k/a "Pat" Matassini; ADRIAN CUESTA, a/k/a "Andy" Cuesta; VITO LAURO; and GLORIA OPHELIA PATTERSON

INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

From on or about January 1, 1976, and continuing to on or about the date of the return of this indictment, at Tampa, Florida, in the Middle District of Florida, and elsewhere,

EDDIE R. CALLAHAN; ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez; GLORIA OPHELIA PATTERSON; ADRIAN CUESTA, a/k/a "Andy" Cuesta; LEO MATASSINI; VITO LAURO; JOHN T. BOWLES, a/k/a J. T. Bowles; and BRYANT W. BOWLES

did willfully, knowingly, intentionally and unlawfully conspire, combine, confederate and agree together and with each other and with other persons both known and unknown to the Grand Jury, to commit an offense against the United States; that is, to violate Title 21, United States Code, Section 841(a).

It was a part of said conspiracy that ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, EDDIE R. CALLAHAN and GLORIA OPHELIA PATTERSON, and others, would obtain controlled substances, to wit: marihuana and cocaine, from JOHN T. BOWLES and BRYANT W. BOWLES, and other sources, both known and unknown to the Grand Jury, and would distribute said controlled substances to ADRIAN CUESTA, a/k/a "Andy" Cuesta, LEO MATASSINI, VITO LAURO, and other persons both known and unknown to the Grand Jury, who agreed to possess said controlled substances for the purpose of further distribution to buyers unknown to the Grand Jury.

In furtherance of the conspiracy and to achieve and effect the objects of the conspiracy, at least one of the defendants committed at least one of the following overt acts:

OVERT ACTS

1. On or about April 6, 1976, at Callahan Bail Bonds, 1813 N. Tampa St., Tampa, Florida, ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico", ADRIAN CUESTA, a/k/a "Andy", and LEO MATASSINI, discussed the possession and distribution of "Red Columbian."

2. On or about April 22, 1976, at Callahan Bail Bonds, 1813 N. Tampa St., Tampa, Florida, EDDIE R. CALLAHAN and ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico", discussed the possession and distribution of "Columbian Red."

3. On or about April 24, 1976, JOHN T. BOWLES, a/k/a J. T. Bowles, and ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, met outside Callahan Bail Bonds office, Tampa, Florida, at which time J. T. Bowles delivered a sample of marijuana to "Pico" Lopez.

4. On or about April 28, 1976, at Callahan Bail Bonds, Tampa, Florida, "Pico" LOPEZ and GLORIA OPHELIA PATTERSON discussed the importation of marijuana into the United States by JOHN T. BOWLES.

5. On or about April 30, 1976, at Callahan Bail Bonds, Tampa, Florida, "Pico" LOPEZ and VITO LAURO discussed the possession of forty pounds of "Mexican", and the possession of "coke".

6. On or about May 17, 1976, at Callahan Bail Bonds, Tampa, Florida, "Pico" LOPEZ and JOHN T. BOWLES negotiated the sale of "volumes" of imported marijuana.

7. On or about May 17, 1976, ANTHONY GEORGE LOPEZ, JR., a/k/a "Pico" Lopez, and JOHN T. BOWLES, a/k/a J. T. Bowles, met at Callahan Bail Bonds, Tampa, Florida, and discussed the distribution of large quantities of marijuana.

8. On or about June 16, 1976, "Pico" LOPEZ had a telephone conversation with GLORIA OPHELIA PATTERSON in which he advised her to conceal and cover up his activities concerning the possession and distribution of controlled substances.

9. On or about June 21, 1976, in Hendry County, Florida, BRYANT W. BOWLES, possessed a large quantity of marijuana.

10. On or about August 3, 1976, "Pico" LOPEZ had a telephone conversation with Carl Swartz concerning the purchase, sale, and delivery of cocaine.

All in violation of Title 21, United States Code, Section 846.